DOCUMENT RESUME

ED 221 227 IR 050 008

TITLE	Copyright Office, the U.S. Patent and Trademark Office, and the Copyright Royalty Tribunal. Oversight Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary. House of Representatives, Ninety-Seventh Congress, First Session (March 4 and June 11, 1981).
INSTITUTION	Congress of the U.S., Washington, D.C. House Committee on the Judiciary.
PUB DATE	81
NOTE	155p.; Small print in several statements may not reproduce well.
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Audiodisc Recordings; Broadcast Industry; Cable Television; *Copyrights; Court Litigation; *Federal Legislation; Federal Regulation; Government Role; Intellectual Property; *Patents; Technology Transfer
IDENTIFIERS	Copyright Law 1976; *Copyright Royalty Tribunal; General Accounting Office; Jukeboxes; Public Broadcasting; Royalties; *Trademarks

ABSTRACT

Statements and testimony from four major and eight additional witnesses comprise these 1981 hearings. David Ladd, Register of Copyrights and Associate Librarian for Copyright Services, reports on the functions and administrative operations of the Copyright Office since the new copyright law came into effect in 1978. The functions of the Patents and Trademarks Office, its current problems, and the future of the industrial property system are delineated by Rene D. Tegtmeyer, Acting Commissioner of the Office. Clarence L. James, Jr., Chairman of the Copyright Royalty Tribunal, advocates elimination of the Tribunal, which currently sets compulsory royalty fees for certain uses of copyrighted material in cable television, phonograph recordings, jukeboxes, and public broadcasting. Based on a review of the Tribunal's legislative history, proceedings and procedures, and its effect on 18 private organizations, Wilbur D. Campbell of the U.S. General Accounting Office recommends that Congress amend the Copyright Act of 1976 and appropriate additional funds to improve the Tribunal's operations. Future options for organization of the Tribunal, its key rate setting and distribution decisions to date, and the pros and cons of eliminating its compulsory licenses are also outlined. Supporting materials are provided in the four appendices. (ESR)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED221227

IR

COPYRIGHT OFFICE, THE U.S. PATENT AND TRADEMARK OFFICE, AND THE COPYRIGHT ROYALTY TRIBUNAL

OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

COPYRIGHT OFFICE, THE U.S. PATENT AND TRADEMARK OFFICE, AND THE COPYRIGHT ROYALTY TRIBUNAL

MARCH 4 AND JUNE 11, 1981

Serial No. 17

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

IR050008

Printed for the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
83-756 O WASHINGTON : 1981

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, Jr., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, Jr., Michigan
JOHN F. SEIBERLING, Ohio
GEORGE E. DANIELSON, California
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
SAM B. HALL, Jr., Texas
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
BILLY LEE EVANS, Georgia
DAN GLICKMAN, Kansas
HAROLD WASHINGTON, Illinois
BARNEY FRANK, Massachusetts

ROBERT McCLORY, Illinois
TOM RAILSBACK, Illinois
HAMILTON FISH, Jr., New York
M. CALDWELL BUTLER, Virginia
CARLOS J. MOORHEAD, California
JOHN M. ASHBROOK, Ohio
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
HAROLD S. SAWYER, Michigan
DAN LUNGREN, California
F. JAMES SENSENBRENNER, Jr., Wisconsin
BILL McCOLLUM, Florida

Alan A. Parker, *General Counsel*
Garner J. Cline, *Staff Director*
Franklin G. Polk, *Associate Counsel*

Subcommittee on Courts, Civil Liberties, and the Administration of Justice

ROBERT W. KASTENMEIER, Wisconsin, *Chairman*

JACK BROOKS, Texas
GEORGE E. DANIELSON, California
BARNEY FRANK, Massachusetts

TOM RAILSBACK, Illinois
M. CALDWELL BUTLER, Virginia
HAROLD S. SAWYER, Michigan

Bruce A. Lehman, *Chief Counsel*
Timothy A. Boggs, *Professional Staff Member*
Gail Higgins Fogarty, *Counsel*
Michael J. Remington, *Counsel*
Thomas E. Mooney, *Associate Counsel*
Joseph V. Wolfe, *Associate Counsel*

CONTENTS

HEARINGS HELD

Page
March 4, 1981 ... 1
June 11, 1981 ... 75

WITNESSES

Campbell, Wilbur D., Deputy Director, Accounting and Financial Management Division, U.S. General Accounting Office ... 77
    Prepared statement ... 85
James, Clarence L., Jr., Chairman, Copyright Royalty Tribunal ... 51
    Prepared statement ... 67
Ladd, David, Register of Copyrights and Associate Librarian for Copyright Services ... 2
    Prepared statement ... 16
Laurence, Margaret M., Assistant Commissioner for Trademarks, Department of Commerce ... 28
Leibowitz, David E., Senior Attorney-Adviser, General Counsel's Office, Copyright Office ... 2
Lemonias, Peter J., Project Manager, Accounting and Financial Management Division, U.S. General Accounting Office ... 77
Oler, Harriet, Senior Attorney-Adviser, General Counsel's Office, Copyright Office ... 2
Raaum, Ronell B., Group Director, Accounting and Financial Management Division, U.S. General Accounting Office ... 77
Schrader, Dorothy, General Counsel, Copyright Office ... 2
Tegtmeyer, Rene D., Acting Commissioner of Patents and Trademarks, U.S. Department of Commerce ... 28
    Prepared statement ... 35
Usilaner, Brian L., Associate Director, Accounting and Financial Management Division, U.S. General Accounting Office ... 77
Yost, William, Assistant Commissioner for Finance and Planning, Department of Commerce ... 28

APPENDIXES

A. Report of the Copyright Royalty Tribunal on "Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting" as required by 37 CFR 304.14 ... 137
B. Annual Report of the Copyright Royalty Tribunal for the Fiscal Year Ending September 30, 1980 ... 142
C. Copyright Owners Proposal for a System-By-System Rate for Cable ... 150
D. Letter from Robert D. O'Brien, President, USTA, to Honorable Robert W. Kastenmeier ... 151

COPYRIGHT OFFICE, THE U.S. PATENT AND TRADEMARK OFFICE, AND THE COPYRIGHT ROYALTY TRIBUNAL

WEDNESDAY, MARCH 4, 1981

House of Representatives,
Subcommittee on Courts, Civil Liberties
and the Administration of Justice,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Frank, Butler, and Sawyer.

Also present: Bruce A. Lehman, counsel; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. Kastenmeier. The committee will come to order.

We are pleased to continue the second day of oversight hearings this morning. The hearings will be on the Copyright Office, the U.S. Patent and Trademark Office, and the Copyright Royalty Tribunal.

I'm sorry to say Mr. Railsback, because of illness in his family, cannot be here today.

This morning, this may be the first opportunity to greet the new Register of the Copyright Office, who, in fact, appeared many years ago before this subcommittee in a totally different capacity as the Commissioner of Patents, in his widespread interest and devotion in both the public and the private sector or the intellectual property in this country and is probably one of the most knowledgeable people in America.

I recall when he was Commissioner of Patents and I welcome him. I note that Ms. Schrader is here also, a person with whom we have dealt in the past in the Copyright Office. I would like to say at the outset this morning, we are entertaining these hearings essentially on the administrative function of the several offices, but, parenthetically, we will, in due course, be looking at more substantive matters involving the several fields and there are some very important economic and judicial questions as well as questions that relate to the copyright field with respect to cable and other matters. This morning one can read the morning paper and see that there's an important decision about the patentability of computer programs, which also affects, perhaps in some sense or another, both patents and copyrights.

Recently we passed a bill more precisely relating to the copyrightability of computer material, which we haven't even digested yet. So, we may ask you some questions about that, since it seems really timely to do so.

But, for the most part, we are interested in the administrative functioning of the offices rather than each of the many perplexing substantive questions that may affect both copyrights and patents.

At this point I'd like to greet and yield to our witness, the Honorable David Ladd.

TESTIMONY OF DAVID LADD, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, ACCOMPANIED BY DAVID E. LEIBOWITZ, SENIOR ATTORNEY-ADVISER; DOROTHY SCHRADER, GENERAL COUNSEL AND ASSOCIATE REGISTER FOR LEGAL AFFAIRS; AND HARRIET OLER, SENIOR ATTORNEY-ADVISER

Mr. LADD. Mr. Chairman, Mr. Butler, and counsel, I am very grateful for your generous statements and I accept them with gratitude, but on a note of levity, I want to tell you about a recent exchange between the chairman of a House Appropriations Subcommittee and a witness. The chairman greeted the witness with a generous and lavish introduction and the witness said, in a rather embarrassed manner, "I think that's overstated." And the chairman said, "Well, yes, it is, but it's customary here in Washington."

But, nevertheless, thank you.

Mr. Chairman, I'd like to introduce Dorothy Schrader, who is General Counsel and Associate Register of the Copyright Office for Legal Affairs, to my immediate right. To her right is Harriet Oler; and, to my left is David Leibowitz. Both are senior attorney advisers in the General Counsel's Office.

Mr. Chairman, I will be guided entirely by how you would like me to proceed. I have submitted a prepared statement and have attached an organizational chart which describes the functions of the Office. I propose to speak in outline rather than reading the statement.

If at any point you would like me to move a little more rapidly, I'm sure you'll tell me that.

Mr. KASTENMEIER. May I reply by saying you may proceed as you wish. I do wish you to cover at least the essentials of the points you raise in your statement. You are correct. Your statement is about nine pages long. It's not very long.

Mr. LADD. I will be glad to do that.

Mr. KASTENMEIER. And however you care to proceed, so that both the members and staff, and those who otherwise ordered these hearings may have the benefit of your prepared statement, and especially at least treat on all the questions.

Mr. LADD. I'll be glad to do that.

I am, as you suggested, Mr. Chairman, new to the job; I was appointed to the position of Register of Copyrights and Assistant Librarian of Congress in June 1980. This is, indeed, my first appearance before this subcommittee, although I have appeared before the predecessor subcommittee. We welcome this opportunity to be here and we shall welcome the continued advice, counsel, and direction of this committee in its oversight capacity.

I was told that one of the functions of this appearance is simply to allow the members to become acquainted with me, so I will give you a very brief biographical note. I was born and reared in southern Ohio in a town which no longer exists. I don't think there's a casual connection. My father was a railroad brakeman and my mother, after his death, was a shoe factory worker. While I was not reared in a log cabin, I did grow up in a house without running water. I attended public schools, went to Kenyon College, served in the Army, took my undergraduate and law degrees at the University of Chicago, practiced in the patent, trademark and copyright field in a firm headed by a former Commissioner of Patents, Casper Ooms, was appointed Commissioner of Patents in the Kennedy administration, returned after that to practice in Chicago and then returned to Ohio where I practiced for 7 years and then joined the law faculty of the University of Miami, from which I came to this position.

I did not present myself for this position, but I am very grateful for the appointment and the opportunity to serve this body of law and the creative talents and entrepreneurs which it is intended to serve, as well as the public which uses copyrighted works.

As this committee knows better than I, in January 1978 a comprehensive statutory revision of our copyright law came into effect. That was achieved after a long and sometimes difficult legislative journey, and the achievement of that towering statutory enactment is attributable to the wisdom and patience of you, Mr. Chairman, and Mr. Railsback, Mr. Lehman, Mr. Mooney, and the other present and former members and staff of this committee.

As I mentioned in the prepared statement, that achievement is so widely acknowledged and honored, here and abroad, that it remains here for me merely to state my respect as well.

I think one could look at the enactment of that comprehensive statutory revision generally as an effort to accommodate copyright law to extremely rapid changes in technology, extending, in the case of the enactment, from 1909 to 1976. Those technological changes continue at a very rapid rate and they present numerous challenges to the copyright system. They present a challenge to copyright itself because photocopying and tape recording, for example, are new techniques of copying and infringing works which are, in many cases, difficult to police. And at the same time there are challenges to continue to adapt the law to the new technologies which make new forms of artistic expression possible. Not merely artistic expression, but the kind of creative expression one finds in computer technology.

I would like now to turn to a description of the Copyright Office and briefly describe its functions, leaving, of course, room for any questions that the committee and staff would care to ask.

The Copyright Office is one of seven departments in the Library of Congress. If you look at chart 1, appended to the prepared statement, the present organizational structure of the Copyright Office is there given. I think it would not be unfair to say that the essential function of the Copyright Office lies in the Examining Division, where claims to copyright registration are received and processed.

To the right on the chart you will see identified the Cataloging Division. In that section of the Office bibliographic registers and directories of registered works are compiled and distributed. And, in addition, instruments reflecting the assignment of copyright rights and notices of termination of rights are recorded and maintained.

To the right of that you will see the Acquisitions and Processing Division. This division has two main functions. One is the initial processing of what we call in the Copyright Office the front end, by which submissions of all kinds are received, whether they be applications for registration or deposits under section 407 in which no claim for registration is involved. All of the work that comes into the Office comes in through that front end contained in the Acquisitions and Processing Division.

There's another extremely important function in A. & P., and that is the function of making demand for deposit of works published in the United States with notice of copyright. Under the authority of the statute, we now may require deposit of such works for the collections of the Library of Congress. And that leads to an important point about the rate of the Copyright Office. Copyright deposits are a primary source for the collections of the Library. That has been so for many years. It's more so now than ever. And with shrinking budgets for acquisitions by the Library the Office's role in acquiring deposit copies either in connection with applications for registration, deposits without requests for registration, or deposits which are made in response to a formal demand under the statute will continue to constitute the fundamental means of acquiring works for the collections of the Library.

The Records Management Division, which you will see listed in the organizational chart immediately to the right of that, maintains the very elaborate card catalog of all copyright registration entries, and, in addition, manages those deposits including unpublished works which we are required by law to keep. We also, as a matter of practice, retain most of the deposits which are not selected by the Library of Congress to be added to its collection. They are at the moment contained in a bulging warehouse on Pickett Street in Alexandria.

And, finally, to the right of that is the Licensing Division which is responsible for the copyright licensing of jukeboxes under section 116 compulsory license, and collecting fees for them. The division also collects the royalty payments made by cable systems under the section 111 compulsory licensing system contained in the statute.

Now, that in a very summary fashion describes the function of the operating divisions of the Copyright Office, and I will skip for the moment a description of the staff offices which are located on the organizational chart above that.

One thing that may be of interest about the activities of the Copyright Office within the last year, is that we have moved from what I suppose could be called temporary facilities which we occupied for a number of years in Crystal City, Va., and the entire Copyright Office has now been physically brought back to Capitol Hill and housed in the Madison Building.

I might say, Mr. Chairman, that at the convenience of the committee we would welcome its members and its staff, either individually, or as a group, to visit the Copyright Office and tour our facilities and, see the functions of the Office.

I would like to pass now to a couple of mandated studies, one specifically mandated by the statute itself, and the other mandated—although I must say there's some argument as to whether it's mandated—by two Members of the Senate at the time of the enactment of the statute. The studies concern the success of the photocopying section of the statute in balancing the interests of the users on the one hand and copyright owners on the other and the so-called manufacturing clause.

Section 108(i) requires that reports concerning photocopying be filed by the Register at 5-year intervals, and the first of those reports is due in January 1983. The Copyright Office has conducted a series of regional hearings inviting the copyright industries, user constituencies and authors to express their views on the functioning of section 107 which, for the first time, codifies the fair use doctrine which has long been a part of our law in the United States, and, section 108 which provides for specific permissions for qualifying libraries to engage in certain photocopying activities. These regional hearings have now been completed with the last 2-day hearing in New York in January. There is at the moment, under a contract what we regard to be extremely important, a study being conducted on the empirical facts of what kinds of photocopying are occurring and to what extent, and in what kind of places in the United States. This study was framed in cooperation with an advisory group within the Copyright Office and an external advisory group made up of representatives of owner and user constituencies. I don't recall right now when that report is due.

Ms. SCHRADER. March 1982.

Mr. LADD. The second study, which I will characterize as mandated, relates to section 601 of the statute governing the manufacturing clause. That is a clause of which there was an ancestor in previous statutes requiring for certain nondramatic literary works, as a condition of protection, that the printing be done in the United States. That section has been, in the view of some scholars and attorneys, an embarrassment in the law for sometime, and there is built into this statute a self-destruct mechanism—that is to say, that even in its surviving and much reduced form, the manufacturing clause will, unless congressional action is taken, expire automatically on July 1, 1982.

In the closing days of the revision, Senator McClellan and Senator Scott formally requested the Copyright Office to conduct, before that expiration date, a study to try to ascertain the possible effect upon American industry, American workmen and the like, of the expiration of that clause. And in obedience to that, we have conducted a hearing in January of this year. The hearing ran a full day, and the Office is now studying the submissions, as well as reviewing the transcript of that hearing and will have its report ready by July 1 of this year.

Now, if I may turn to the administrative aspects of the Office. In the first year, I set for myself as goals, obviously, to maintain the established operations of the Office, to acquaint myself and extend my understanding of the policy and legislative issues which are confronting the Office and the copyright system generally, and to establish working relationships with the Library, the copyright proprietor and user constituencies, the bar, and with the committees of Congress. I would like to give you some data relating to the condition of the workload of the Office.

In preparation for the coming into effect of the revision act, the Congress authorized the Copyright Office to build up its staff rather substantially. I will not give you the figures year by year, but from fiscal year 1977 when we were authorized 474 positions; the staff rose to 596 in 1979, and then was cut back in fiscal 1981 to 573.

There are two reports relating to the operations of the Copyright Office, of which the committee should be advised. The first was conducted by the legislative investigating team of the House Appropriations Committee. That report was issued in March 1979; it found deficiencies and required the Office to make an effort to increase its productivity. There was a follow-on study conducted by the internal audit section of the Library of Congress, which came to conclusions of like tenor. So consequently, during this fiscal year, heavy emphasis has been laid on increasing productivity within the Office.

I promised that I would make this short, but I think that I can explain this most readily by asking you to look at chart 2, which is in the prepared statement. It gives a very quick view of the condition of the workload of the Office. If you will look at the line on which the legend is "minus goal," you will see that 85,000 occurs in each column. That 85,000 figure represents what the Office considers to be a normal working inventory; by "normal working inventory," we mean a workload which would allow the Office, in the ordinary course, to issue the certificate of registration within 3 to 4 weeks after the application is received.

Then if you will look on the line immediately above that, you will see the total number of claims for copyright registration pending in the intervals which are given. These figures on pending claims result from a physical count, because, curiously enough, until our information system is completely deployed in the Office, we do not have a continuous means of monitoring what the workload is. That will change when the COINS system is in full operation.

You will note that from January 1979 to May 1980 there was a steady decline in the total number of cases. Concomitant to that, if you look at the bottom line, what we call the backlog, that is to say, the pending cases minus the 85,000, the backlog also steadily declined until May 1980. There is a jump both in the number of pending cases and the backlog for October 1980. That jump occurred during that interval of the move to Capitol Hill, and I believe a substantial part of that loss is attributable to the move.

If you compare the figures for October 1980 to January 1981, you will see that the slippage was much reduced. Negligible, really. And when that is taken into account with what we have done in terms of eliminating expenditures in the Office, I am pleased with the result. What I mean by that is this: both of the reports to which I have referred complain about the quantity of overtime in the Copyright Office, which in fiscal year 1980 totaled $650,000. That has been virtually eliminated.

And in this fiscal year, the expenditure for overtime will be an estimated $20,000, a reduction from $650,000 to $20,000. That represents the equivalent of 45 positions at a grade 8, step 5 level, and when taken together with the 20 positions by which we were reduced in the appropriations action in the preceding year, we are now operating with more than 10 percent less applied work power than before.

This turns out, in retrospect, to have been a very fortunate decision for a reason we did not expect. The Library and the Copyright Office have presented their budget request to the House Appropriations Committee. We are all aware of the very strong pressures to reduce Government expenditures. We have in the past been required to absorb retrospectively parts of pay increases that have been granted. We have continued to spend into this particular fiscal year on a continuing resolution keyed to last year's appropriation.

This deep in the year, if we are retrospectively required to absorb a substantial part of the 9.17-percent pay increase, it will be difficult to contain, and without the elimination of this overhead, it could have been disastrous.

Mr. Chairman, we will be glad to answer any questions now or later that you or any member of the committee or staff may have.

Mr. KASTENMEIER. Thank you, Mr. Ladd. As I indicated at the outset, some weeks from now we will be looking at possible changes in the copyright law. Certainly, we will be looking at issues. Will you be prepared to be a resource in that connection? Will you speak out on each of these substantive issues as they arise? Are you prepared to have views to share with us on the prospect?

Mr. LADD. Of course. I will do that to the best of my ability.

Mr. KASTENMEIER. I asked because I'm not sure that each Register is necessarily prepared to do precisely what the preceding one did. Ms. Ringer was very knowledgeable and very prepared to share views about the substantive changes in copyright law.

Before I forget, since it is in the paper, do you have any view about the so-called patent case and the patenting of computer programs as referred to in the morning paper? Would it have any relevance to copyright?

Mr. LADD. It certainly has relevance to copyright, and if for no other reason, because of the statutory change which was worked by the action of the Congress in the last session. I have not had time to read the newspaper report, let alone, an opinion itself, and am not prepared to respond in depth to it at this time.

Mr. KASTENMEIER. You say that all facilities relating to the Copyright Office are now housed in the James Madison Memorial Building?

Mr. LADD. Except the storage of copyright deposits at the Pickett Street warehouse in Alexandria, yes.

Mr. KASTENMEIER. You are no longer in the old Library of Congress building at all?

Mr. LADD. No.

Mr. KASTENMEIER. Could you give us just a concise view of how, in your view, the compulsory licenses are working?

Mr. **Ladd**. The cable compulsory license? The mechanical license? Which one are you particularly interested in?

Mr. **Kastenmeier**. Well, I would just say all of them. But do you think some are more troublesome than others; if so, which?

Mr. **Ladd**. Certainly, the cable license is troublesome, and I have not the slightest doubt that whatever the initiatives are within the Congress, this committee and the Congress generally will be waited upon by interests who are going to want revision with the cable license. And that is going to be caused in large part by the recent action of the FCC in deregulating cable, insofar as the importation of distant signals and the elimination of syndicated program exclusivity is concerned. So I am sure that that issue will arise in one form or another before this committee in this session of Congress.

Mr. **Kastenmeier**. Much of your work, as you refer to, is registration of copyrighted works. Under the 1976 act, the work of authorship is copyrighted before the moment of its creation. In view of this, do you think the bureaucracy involved in registration, as such, is still needed?

Mr. **Ladd**. I think that's an important and fundamental question, and I think that it should be examined. There is not a country in the world which maintains the kind of establishment that we do relating to registration and title of copyrighted works.

One of the things that I would like to see done, and in the not-too-distant future, is some kind of empirical study made about the cost effectiveness of maintaining the kind of registration system that we have. This question, by the way, is necessarily involved in the broader question of whether or not the United States should approach on any basis, adherence to the Berne Convention. Quite apart from that, if the Berne Convention were not involved, this question of the cost effectiveness of our registration system should be examined.

Now in the past, there has been much scholarship and opinion directed to legal analysis of what the disparities are between the domestic copyright law in the United States and the requirements of the Berne Convention. To my knowledge, however, there has never been any comprehensive and systematic study made comparing how private transactions relating to the ownership and exploitation of copyrighted works are achieved in the United States and in other countries. I believe that that kind of study is indicated, and that every system should continually be subjected to this kind of cost-benefit evaluation.

I might say that on the basis of conversations that I had in New York yesterday, for example, with three distinguished leaders of the copyright bar, that their view was, despite the fact that in the past, Ms. Ringer and the late Mr. Kaminstein both have publicly expressed the view that they thought that American interests would best be served by ultimate American adherence to the Berne Convention, there are people who believe that the market and our institutions in the United States are sufficiently different from those of foreign countries, that a system like the one that we have now may very well prove to be cost-effective.

To summarize, it is a question which should be asked and any conclusions should be undergirded by serious analytical studies. However, there are divergent views in the copyright community concerning the elimination of the formalities of registration and recordation.

Mr. **Kastenmeier**. Thank you, Mr. Ladd. I won't pursue further questions, except to say that when we do get into substantive matters, perhaps next month, we might take that occasion to invite you also to give extended remarks on policy matters which affect the Copyright Office and copyrightability, some of those in conflict, and some of those perhaps not in conflict. I think we clearly need a much more comprehensive discussion of the field of copyright.

Mr. **Ladd**. As I said, I'll be glad to do that, to the best of my ability, and if the committee or any of its members have specific issues on which they would like us to prepare analysis and testimony, I will obviously be pleased to do that.

Mr. **Kastenmeier**. Thank you. And I yield to the gentleman from Virginia, Mr. Butler.

Mr. **Butler**. Thank you, Mr. Chairman. I, too, welcome the new Register. I feel like you've made the transition from that log cabin in Ohio to the austerity of James Madison very gracefully, and we look forward to working with you.

I'm not one of those praised in the beginning of your statement for their great participation in the copyright revision, because I had no part in it, so I hope you'll bear with me when I ask you a few questions.

For example, you have mentioned a Convention—the Berne Convention.

Mr. **Ladd**. Yes.

Mr. **Butler**. Just for the record, what is that?

Mr. **Ladd**. It is an international treaty adhered to by most of the major industrial and developed countries, providing for a certain minima of protection which are required to be afforded under domestic law of those countries which are signatory to the Convention.

Mr. **Butler**. Thank you. Now, turning to one of the questions raised by the chairman, in the collection function of your licensing division, that's a statutory responsibility imposed on you with regard to the compulsory licensing fee. Explain to me how effective you think you are in actually making collections, identifying the obligations and collecting money. Do you have a view of that?

Mr. **Ladd**. I can, if you care to, give you data on the fees which are collected. But I don't think that's the thrust of your question. If the question is: Are the cable systems being faithful in paying all the amounts which are legally due, we don't look behind the papers which present the revenue figures on which the royalty is calculated.

Mr. **Butler**. How do you arrive at the conclusion that you have no obligation to look behind those revenue figures?

Mr. **Ladd**. I think I'll ask Dorothy Schrader to respond to that question. We don't do it.

Ms. **Schrader**. Mr. Butler, we don't see in the statute any specific direction to the Copyright Office to engage in the very detailed examination of the Statement of Account. We are directed to receive the Statements of Account, receive the money, and transmit the money to the U.S. Treasury. Now, we do make a very limited examination in the case of obvious errors and to the extent that we have issued a regulation about a particular form or particular procedure. If there is an obvious error or our regulations have not been followed, then we would correspond and get a clarification or correction. Unless we are directed otherwise, we do not see that we have the statutory authority to do more.

Mr. BUTLER. Do you audit those at all?

Ms. SCHRADER. No.

Mr. LADD. We have no enforcement powers in relation to those collections, Mr. Butler.

Mr. BUTLER. What sanctions would be available to you if a cable company wrote in and said, under the statute as written we owe you such and such, but we refuse to pay it? What action would be available to you then?

Ms. SCHRADER. We have no sanctions except to continue to try to tell them, if there is a clear obligation, what that obligation is. But we have no enforcement power.

Mr. BUTLER. I don't want my silence to be considered acquiescence on that subject. It seems to me that when you're seeking to collect the money that somewhere implicit in that is an obligation to be nasty about it if you don't get it. So I thank you for your answer. I will reserve judgment on the response.

Mr. KASTENMEIER. Would the gentleman yield?

Mr. BUTLER. Certainly.

Mr. KASTENMEIER. Of course, that responsibility has traditionally been the responsibility of the copyright owner and the question might be asked what recourse does the owner have? We have never historically—and the gentleman is correct, certainly we would want to review that—but historically imposed upon the Copyright Office itself any enforcement authority. It's neutral as far as its collection sanctions. It's an entity, a repository. Indeed, there are in some cases criminal sanctions for violations of copyright law. But the U.S. attorney and the copyright proprietor are among the parties to be interested, but not the Copyright Office itself, which is essentially neutral.

Mr. BUTLER. I thank the chairman and, as I said in the beginning, I'm proceeding from a vast amount of ignorance in this area. But, as a taxpayer and maybe even a copyright owner who might be getting the benefit of the cable collections, I'm a little shocked at this process. But I'm not in the position to be overly critical, which, as you know, is not my nature anyway. [Laughter.]

Mr. BUTLER. But what is the situation with reference to the jukebox collections? Is that another division of your collection process?

Mr. LADD. Again, in that case also we have no enforcement powers and there is a serious problem in that area because there is a large degree of noncompliance of the legal requirements that jukeboxes be licensed. We have been in consultation not only with the owners of the copyrights which are affected, but also the Department of Justice, urging them to bring action to compel or encourage wider compliance with the juke-box provisions of the copyright statute. We will continue to do that. It is a problem.

Mr. BUTLER. Is there some difference in the collection authority under the statutes as to juke boxes versus cable?

Mr. **Ladd**. No.

Mr. **Butler**. The collection process is the same?

Mr. **Ladd**. Yes.

Mr. **Butler**. And your authority is the same but your results may be different?

Mr. **Ladd**. Yes. The Copyright Office has no enforcement power of any kind.

Mr. **Butler**. Yes, I understand that.

Mr. **Ladd**. Except we have power to demand deposit of public works. But in the area that you're talking about, we have enforcement power.

Mr. **Butler**. Well, as far as deposit works are concerned you also have the power to insist upon payment of the fee at the time copyright applications are filed.

Mr. **Ladd**. Oh, yes. That's in the statute.

Mr. **Butler**. That's a statutory fee.

Mr. **Ladd**. That's part of the application, as a matter of fact.

Mr. **Butler**. And, of course, you deny the application if you don't receive the money.

Mr. **Ladd**. Yes.

Mr. **Butler**. What is that fee now?

Mr. **Ladd**. $10.

Mr. **Butler**. And when was it last established?

Mr. **Ladd**. With the revision.

Mr. **Butler**. The 1976 statute?

Mr. **Ladd**. Yes.

Mr. **Butler**. And what was it prior to that?

Mr. **Ladd**. $6, by and large.

Mr. **Butler**. Is it time to take another look at that?

Mr. **Ladd**. Yes, it is.

Mr. **Butler**. Do you have a recommendation?

Mr. **Ladd**. We have undertaken a program to develop recommendations to the Congress that the fee be increased. As a matter of fact, I hope to have that package ready to go through the normal procedures sometime between May 1 and July 1. As close to May 1 as possible.

Mr. **Butler**. In 1976, at the time the fee was set of course you weren't there, but just as a point of reference, how did the $10 compare with the administrative costs of filing initially?

Mr. **Ladd**. Let me do this from memory, and if you want, I'll get more accurate information to put in the record. Roughly the percentage of the expense of the Office in relation to the amount recovered by fees is 2 to 1. In other words, about one-third of our budget of approximately $15 million is recovered by fees. That's from recollection. Let me get more precise data. By the way, the ratio is declining.

Mr. **Butler**. The ratio is declining?

Mr. **Ladd**. The ratio of fees received and total budget is declining.

Mr. **Butler**. You mean becoming smaller?

Mr. **Ladd**. A smaller fraction.

Mr. **Butler**. One more question, if I may, Mr. Chairman. Just philosophically, is there any reason why all of the costs of the Copyright Office should not be assumed by those who are getting the benefit of it—the applicants?

Mr. **Ladd**. I do have views on this, and I think the answer to your question is "Yes." There are reasons why it should not fall totally on the applicants. There are activities of the Copyright Office which do not rebound to the benefit of claimants, and there is a question as to whether or not we should impose upon the claimants for registration the full burden of the Office, including activities from which they do not benefit.

Now, I personally subscribe to the user principle. I believe that in general these people who are special beneficiaries of Government services should bear a special proportion of the expenses of the Government agency in the securing and helping to protect their rights. I testified on this issue before, to the predecessor committee to this one, at great length in 1962, when the question was raised then—and the proposition was not then accepted—of introducing maintenance fees into the patent statute. The rationale there was the user principle. There was a long debate. I don't think it is possible to resolve with any kind of mathematical precision what portion of the Patent and Trademark Office—and I'll not testify at length about that, because you have a witness behind me who will talk about that. But the question raised then was what proportion of operating costs should be put on the special beneficiaries of the patent system, namely, the patentees, as against the proportion which should be borne as a general expense of the Government.

I have forgotten now what the figure was. My recollection is that in that particular case and time it was set at something like 65 percent. But that is a matter of record in the hearings and reports of the predecessor committee to this one—the House Subcommittee on Patents, Trademarks and Copyrights, as it was called.

Mr. **Butler**. Thank you very much, Mr. Chairman. I yield back.

Mr. **Kastenmeier**. Thank you. After all these years we are now—since the last session finally able to accept for the Patent and Trademark Office the principal of maintenance fees.

The gentleman from California, Mr. Danielson.

Mr. **Danielson**. Thank you, Mr. Chairman. I have only one point. This follows up Mr. Butler's last inquiry and your response. If you are planning to present more precise information on how the fee arrangement has been worked out, it might be helpful to couch that, not only in absolute dollars—$10, for example—but also the percentage of the ratio between total costs and the user fee, because I would imagine as time goes by it might be more interesting to know what the ratio was at the time the fee was imposed.

Mr. **Ladd**. Yes.

Mr. **Danielson**. Since they are apparently traveling on separate courses.

Mr. **Ladd**. Right. We will provide that.

Mr. **Danielson**. I have no other questions, and I thank you very much.

Mr. **Kastenmeier**. The gentleman from Michigan.

Mr. **Sawyer**. I might just say that my knowledge on this subject, if it exceeds Mr. Butler's at all, certainly is de minimis. [Laughter.]

But I would like to ask, just as a matter of course, are the Eastern bloc of nations also a party to this Berne concord?

Mr. **Ladd**. I think the answer to that is that some of them are. Hungary, I think, is.

Ms. **Schrader**. And Czechoslovakia.

Mr. **Ladd**. The Soviet Union is not.

Mr. **Sawyer**. Apparently we're not either, as I understand it.

Mr. **Ladd**. That's correct. We are not.

There is no international society, The Universal Copyright Convention, to which the United States does belong, was developed, I think it is fair to say, to provide a vehicle for international cooperation in the area of copyright without the kinds of minima of protection that are provided for in the Berne Convention, and allow the United States to enter into copyright treaty relations with other countries. And the Soviet Union is a member.

Mr. **Kastenmeier**. Would the gentleman yield?

Mr. **Sawyer**. Sure.

Mr. **Kastenmeier**. Just one comment. I think historically the reason for this is that we evolved our copyright and patent laws quite separately from Europe. I suppose Great Britain did serve as a model in part. The result is that because the provisions in our laws were substantially different in terms of protection and otherwise, we were not able to enter into adherence which required minimal accommodation of laws. So for this reason I think we probably have troubles both in patent and in copyright in the past generations in reference to international treaties. We have been moving conscientiously in the direction of complying our laws somewhat with the rest of Western Europe or the rest of the world.

Mr. **Ladd**. Mr. Sawyer, I might tell you something that Mr. Kastenmeier and counsel for the committee can tell you better than I. The stated reason for several of the changes in our domestic law brought about by the general revision was to move us closer toward a position from which we could, if we chose, adhere to Berne.

The relaxation in the notice requirements is one example. The proposed elimination of the manufacturing clause is another. In the House report of the bill, one will discern places where the modifications were, among other reasons, adopted in order to bring the United States more nearly to a position from which it might choose to adhere to the Berne Convention.

Mr. **Sawyer**. During the last Congress I was surprised to learn that the Patent Office was not in any way using data processing. Does the Copyright Office have data processing?

Mr. **Ladd**. Yes. Those systems are being installed now in stages. But the answer to your question is "yes," we have.

Let me describe two of them. We have a system in the final stages of design by which applications and the like coming into the Office would be immediately entered into a tracking system so that we may know the location and status of any claim which is in our custody at any given time. That system is well advanced and two significant stages are operational now. There is more to be done on it.

We have now installed a computer system for cataloging which will soon eliminate the publication of the printed catalogs of registrations. The output from that system will be a data bank bibliographic entry for the work, a catalog card which will go into our physical card catalog that I mentioned earlier in my testimony, and finally a tape from which to drive the preparation of microfiche which will then become the bibliographical directory for our registrations.

So, yes, we are well along.

Mr. **Sawyer**. Well, when you were asked whether or not the operations of the office ought to be supported in effect by the users, you said a portion of your operation did not benefit users or claimants. What are those? What operations do not?

Mr. **Ladd**. The users, or those who want to know the copyright status of a given work—to answer for themselves the question may I copy and if I may copy, what may I copy—use our files. That benefit is for the proposed user of our file, not for the registrant who has obtained his registration from us.

The publication of the bibliographic directory is another such case. The files we maintain on whether or not an author has tried to effect, in accordance with the statutory provisions, a rescission or a revocation of a license that he is granted, is also something that the registrant does not exclusively benefit from.

Mr. **Sawyer**. Well, it might be a repository for information used to put people on notice, as to whether they would be infringing on a copyright.

It seems to me, arguably at least, a benefit to the one who claims the copyright.

So much for that issue.

While this is a little outside the scope of the operation of the office itself, I remember a number of years ago I was startled to find out by way of a lawsuit against a client that even such songs as "Take Me Out to the Ball Game," or "I've Been Working on the Railroad," and so on, printed in a singalong book were still subject to live copyright infringement claims. Do you have any view about the inperpetuity provision we give copyright?

Mr. **Ladd**. Well, that comes as a surprise to me.

Mr. **Sawyer**. It came as a surprise to us, too.

Mr. **Ladd**. The duration of protection of a copyright is fixed by the statute. It is now keyed through the life of the author, in most cases, and it surprises me that the songs mentioned are still in copyright, although one can, you understand, make a revision or new version of an old work which is in the public domain and that specific version can still be protected as a new work.

Mr. **Sawyer**. I am talking maybe 10 years back, and maybe something has changed since then. But at that point it worked.

Mr. **Ladd**. Well, you know, the basic idea of copyright is that in exchange for the protection which the law affords the author, their protection is limited in time and indeed that is a constitutional requirement.

Mr. **Sawyer**. That's all I have.

Mr. **Danielson**. Mr. Chairman, may I ask a question?

Mr. **Kastenmeier**. The gentleman from California.

Mr. **Danielson**. On this point of the duration, if my memory serves me, when we rewrote the law in 1976 we extended that time, did we not?

Mr. **Ladd**. Yes.

Mr. **Danielson**. What was the time before that? And what is the time now?

Mr. **Ladd**. The previous terms were two terms—a first term and one renewal term, each of 28 years.

Mr. **Danielson**. That would make it an aggregate of 56 years.

Mr. **Ladd**. Fifty-six years from the date of publication.

Mr. **Danielson**. And that was it?

Mr. **Ladd**. Yes.

Mr. **Danielson**. And presently it is the life of the author, but they cannot be extended beyond the life of the author?

Mr. **Ladd**. It is the life of the author plus 50 years.

Mr. **Danielson**. Plus 50 years?

Mr. **Ladd**. Yes.

Mr. **Danielson**. That philosophically gave me real trouble at the time we wrote the law, and I guess it still does. The Constitution still says we can do it for limited times. But how we can go beyond the life of an author and still give it to him for a limited time still confuses me.

Mr. **Kastenmeier**. We also gave extended subsisting rights to copyright for materials which in some cases were copyrighted at the beginning of the century. They were extended for a number of years from about 1962 on beyond 56 years. So that may have otherwise extended the term of the works at the outside which was not contemplated originally at the time of the registration.

Mr. **Ladd**. There are some other embellishments. On some works the duration is measured from the date of publication. The law also reaches back and gets unpublished works and starts them moving toward the public domain. But in the main the term is measured by the life of the author plus 50 years.

Mr. **Danielson**. I appreciate your response. I just couldn't hang on to it. Your answer gave us the ball park figure. Thank you. I don't agree with that figure, but I mean that's the law.

Mr. **Kastenmeier**. One last question, and you may or may not be prepared to answer. That is a comment on the Copyright Royalty Tribunal. Since it is a symbiotic relationship in that it operates in the field of copyright as to its efficacy, are there any changes you might suggest for it, viewed from the Register's office?

Mr. **Ladd**. I do not at this time. I am really not that familiar with the operation to have an informed opinion about that. I am, of course, aware of the views that Ms. Ringer expressed to the committee last year, and I have studied those with care, but I really am not qualified at this time to give you an answer.

Mr. **Kastenmeier**. If you have some view about that, when you next appear we would like to hear it.

Mr. **Ladd**. Yes.

Mr. **Kastenmeier**. Thank you.

That concludes this morning's questions for the Register, and we thank you very much, you and your colleagues, for appearing here.

[The complete statement of Mr. Ladd follows:]

STATEMENT OF DAVID LADD
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES

Before the Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
House of Representatives
97th Congress, First Session
March 4, 1981

Mr. Chairman and members of the Subcommittee, my name is David Ladd, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. I was appointed to those positions last June, and this is my first appearance before you. I thank you and the subcommittee staff for giving me the opportunity to appear here today. The Copyright Office looks forward to the continued benefit of your subcommittee's advice, counsel, and direction, in the exercise of your oversight responsibilities.

On January 1, 1978, an entirely new copyright law came into effect in the United States. This general revision of our copyright statute was the product of over twenty years of administrative and legislative efforts of many members of the Congress, the Copyright Office, the bar, and the representatives of diverse interest groups. In particular, the culmination of these efforts in the enactment of the first new copyright statute since 1909 is a towering achievement attributable to the outstanding wisdom, perseverance, and tireless efforts of your Chairman, Congressman Kastenmeier, your ranking Minority Member, Congressman Railsback, your Chief Counsel, Bruce Lehman, Minority Counsel Tom Mooney, and other present and former members of your subcommittee and its staff. That achievement has been so widely acknowledged and honored, in the United States and abroad, that I need here only state my own personal respect.

The copyright law of the United States is founded on the provision of the Constitution (art. I, sec. 8) which empowers Congress --

> * * * To Promote the Progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This provision embraces the doctrine of exclusive rights to authors for a limited time as a necessary incentive for creation and the continued advancement of learning and culture for the public welfare. The enormous contributions of Americans in arts and culture made possible by virtue of this incentive are recognized throughout the world. I am grateful for the opportunity to serve this body of law and the rights of those creative talents and entrepreneurs it protects and of the public those rights are intended to serve.

During the last few decades, the United States has been in the throes of a vast technological revolution. Applications of space age technology, once considered mere "science fiction", have now become reality, leading to new and diverse methods of creative expression and delivery of information. This revolution, enriching our lives, has, nevertheless, been accompanied by a serious challenge to the author's copyright (e.g., photocopying and tape recording). In addition, our ability to adapt copyright to protect new expressions of authorship made possible by new technologies (e.g. computer programs, holographs) has been tested . The Copyright Act of 1976 has made great strides in meeting these tests. However, it seems likely that future technological developments in areas such as fiber optics, lasers, microcomputers, and the increasing number of methods of artistic expression made available by new technologies may tax the basic philosophical limits of copyright protection and further threaten the foundation of the copyright law. The Copyright Office has monitored, and will continue to monitor, these developments in an attempt to retain the delicate balance of interests enunciated in the Constitution.

I would like to turn now to a brief review of the functions of the Copyright Office under the copyright law.

The Copyright Office is one of seven departments in the Library of Congress and is within the legislative branch of government. A principal function of the Office has been the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners. The Office also records assignments and other transfers of copyright and related documents, and certain notices pertaining to the recording of musical works and the termination of rights earlier granted by authors.

The Copyright Office performs several other functions related to or resulting from its registration and recordation duties. Our Cataloging Division prepares and distributes bibliographic descriptions of all registered works. It also provides basic cataloging for many of the Library's special collections. The benefits of copyright cataloging will, in the near future, be available to all the Library. This will move us closer to the creation of a comprehensive national bibliography -- long a goal of the American library, educational, and even our proprietary communities.

Our Information and Reference Division provides very important services to the copyright community and to the public at large. The division searches and reports, upon request, the copyright facts contained in our records, provides certified copies of certificates of registration, and assists the public in using our files. It also maintains a public information office staffed by courteous and knowledgeable individuals for answering mail, telephone and personal visit inquiries about the copyright law and registration procedures. The Office's public information staff deserves special recognition. Unlike other federal agencies, the Patent and Trademark Office, for example, often we deal directly with individual authors and users who are not generally sophisticated in the nuances of copyright protection and the legal aspects of registration. For this reason, it is particularly important that the Office have able and adept people to serve them. Finally, the Division has an active publication program for the distribution, free of charge, of circulars and similar materials on copyright.

A most significant aspect of Copyright Office operations is its enrichment of the collections of the Library of Congress. Under the Copyright Act of 1976, copies of works published in the United States with a notice of copyright are required to be deposited with the Copyright Office and made available through the Office to the Library of Congress for its collections. The copyright system is the very base upon which the Library of Congress has developed its extensive collections of books, periodicals, music, maps, prints, photographs and motion pictures. In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions described above, the Copyright Act of 1976 gave additional responsibilities to the Copyright Office. We are engaged in licensing jukeboxes throughout the United States to perform copyrighted music; we also play an integral role in the operation of the compulsory licensing mechanism governing secondary transmissions by cable television systems. The Licensing Division of the Copyright Office examines statements and receives statutory royalties from both jukebox and cable television operators. These sums are received in our Office, and, after deduction of reasonable administrative expenses, are deposited with the Treasury Department for investment in interest-bearing U.S. securities and later distribution to copyright owners.

The Copyright Office regularly assists both houses of Congress and its staffs in preparing and commenting on legislative proposals, responding to constituent inquiries and assisting in the further implementation of the copyright law. Last year the Copyright Office completed its move from Crystal City to the Library of Congress James Madison Memorial Building. We hope that the Committee and its staff, together or individually, will visit the Copyright Office in its new quarters.

The new Copyright Act, and accompanying legislative reports, required or requested the Register of Copyrights to make certain studies and reports to Congress and your Committee. I would like to comment briefly on two such studies presently being undertaken. One of the most difficult problems to resolve in the general revision of the copyright law concerned the photomechanical reproduction, in whole or in part, of copyrighted works by libraries and archives. In addition to codifying the doctrine of fair use for the first time (section 107), the copyright statute contains provisions in section 108 authorizing certain acts of reproduction and distribution by qualifying libraries. Because of the uncertainty about the effect of these provisions, at present and in the future, Congress provided that the Register of Copyrights should prepare, at five-year intervals, reports concerning the effectiveness of the balance created by the statute. The first such report is due January 1, 1983. In connection with this mandate, the Copyright Office held five regional public hearings with publishers and librarians to examine practices under section 108 as they have developed since the new law went into effect.

Under section 601 of the copyright law, certain nondramatic literary materials in the English language must be manufactured either in the United States or in Canada in order for the work to enjoy the full remedies provided by the copyright law in an action for infringement of the rights of reproduction or distribution. The "manufacturing clause" now applies only to works by American citizens or domiciliaries, and under special circumstances, even such works may be exempt. Section 601 further states that the manufacturing requirements will terminate on July 1, 1982. During the course of Senate debate preceding passage of the Copyright Act of 1976, Senator Hugh Scott, on behalf of himself and Senator John L. McClellan, asked the Register of Copyrights to study the dangers that may face the U.S. printing industry by virtue of the elimination of section 601. Pursuant to this request, the Office has undertaken such a study and will report its findings to Congress by July 1, 1981.

Now that I have briefly described the functions of the Copyright Office, I would like to turn to the administrative conditions of the Office.

As I have assumed direction of the Copyright Office in the past year, I have had as my objectives :(1) to maintain the established operations of the Office; (2) to acquaint myself with the policy and legislative issues confronting copyright and add to my understanding of others; and (3) to establish working relationships and lines of communication with the authors, the bar, the copyright interests, the user constituencies, and the Congress.

The demands placed upon the Copyright Office by the new Act were great. To equip the Office to breast the storm, the Congress allowed a rapid buildup of staff — from 474 in FY 1977 to 552 in FY 1978, and 596 in FY 1979. The staff was then reduced to 593 in FY 1980 and 573 in 1981.

To assess the effectiveness of that growth in staff, the Legislative Investigating Team of the House Committee on Appropriations studied the Copyright Office, and its operations. The report on that study was dated March, 1979.[1] The report was confidential and has not been publicly disclosed.

That report was critical of the Office and found deficiencies. Among other findings, it found the level of productivity and effective application of personnel time unsatisfactory; and improvement was demanded. At the same time, Copyright Office requests for increases in staff were denied, and in fact, reduction was ordered.

Concomitantly, the House Committee on Appropriations, in its 1981 budget action, instructed the Library to include, in forthcoming budget requests, "a summary of agency productivity goals together with their impact on the budget request."[2] The Library's Internal Audit staff conducted a follow-on study, similarly discerning administrative and productivity problems.

[1] A Report to the Committee on Appropriations, U.S. House of Representatives, on Staffing Policy and Practices - Copyright Office, Library of Congress. [Surveys and Investigations Staff (March, 1979).]

[2] H.R. Rep. No. 96-1098, 96th Cong., 2d Sess. 10 (1980).

Consequently, during the latter half of 1980 and to date, we have concentrated on improving work force effectiveness. Rather than explain in detail the means used, I can best introduce the matter by discussing our work load and the use of the work force. Please refer to the tabulations in Chart 2 of the prepared statements. The figures are broken down by the various points of processing.

The count comes from periodic physical inventories. (Oddly, until our data processing system is fully deployed, the Copyright Office does not have a continuous cumulative account of its work load.) The figure 85,000 on the line "minus Goal" represents what the Office considers a normal work inventory--*i.e.*, a work load with which the Office can, in the ordinary course, issue certificates or registrations within three weeks after receipt of the application.

What we call the backlog, therefore, is the total number of cases on hand, less that 85,000 figure. You will notice a steady decline in the backlog between January 1979 and May 1980, from 81,000 to 41,900; and then an increase from May 1980, to January 1981.

This increase occurred during the period in which the Copyright Office moved from its quarters in Crystal City to its new quarters in the Library of Congress James Madison Memorial Building. Now that increase in the backlog--associated, in large part, I believe, with losses attributed to the move--is unwelcome. Notice, however, that from October 1980 to January 1981, the slippage almost ended. And beginning October 1980, the Copyright Office discontinued overtime equivalent to about 45 positions.

Both studies on Copyright Office operations which I have mentioned were critical of the chronic use of overtime and the appropriations to support it. Accordingly, as of October 1, 1980, we virtually discontinued overtime. It has been reduced from a figure of $650,000 in FY 1980 to an estimated $20,000 in FY 1981. In the appropriations action for FY 1981, the work force of the Office was reduced by 20 positions. Taking into account those 20 positions, plus the equivalent of some 45 positions represented by the overtime (measured at the rate of GS-8, Step 5), then we have effectively reduced the work force of the Office in FY 1981 by about 10%.

In retrospect that decision to eliminate overtime can be seen as fortunate. Like many other units in government, we have, under a continuing resolution, continued to spend at levels keyed to the FY 1980 appropriations. We are all aware of the enormous pressures to reduce government spending. In FY 1980, we were required to absorb a 5.5% pay increase. Last October our employees received a 9.1% pay increase. If we were, this late in the year--having spent thus far at 1980 levels--required to absorb retroactively any part of the latest pay increase, the results would be serious. Without the elimination of overtime, and the savings thus achieved, the results would have been disastrous.

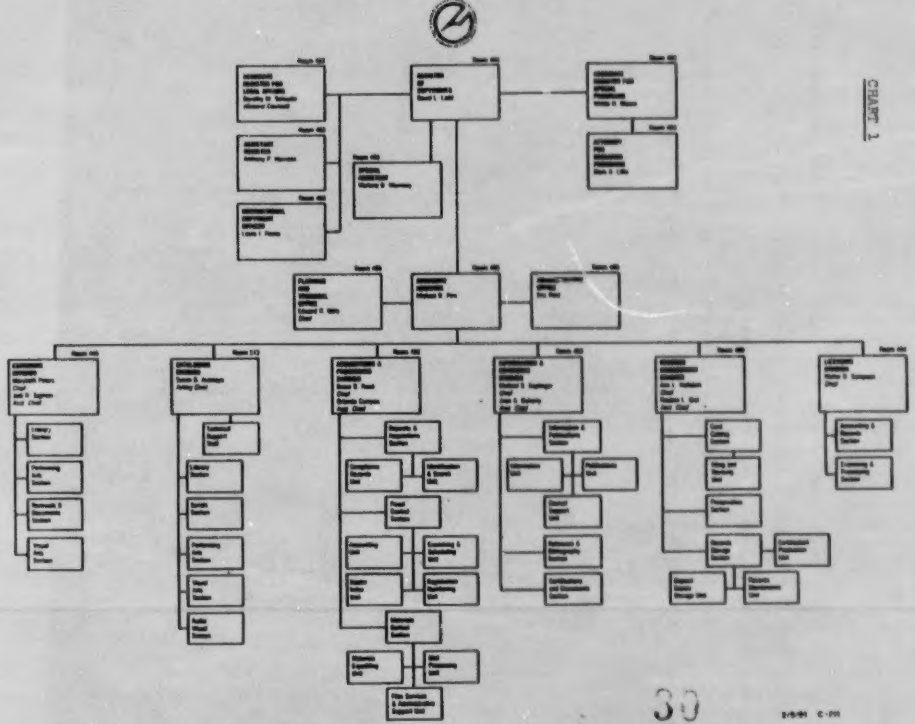
The Subcommittee may also be interested in the trends in registration applications received and registrations of claims in the last five years. That will be represented as follows:

FY	Registration Applications Received (approximate)	Registrations
76	445,080	410,969
77	458,000	452,702
78	416,000	365,697
79	426,000	429,004
80	460,000	464,642

You will note an initial rise in registration applications received followed by a dip and then a sharp rise between FY 79 and FY 80 to a high for the period. The figures for registrations show a parallel trend.

I want to thank you for this opportunity to appear before you and will be pleased to answer any inquiries you may have now or in the future.

CHART 1



30

CHART 2

January, 1981

CLAIMS IN PROCESS

	Jan '79	May '79	Aug '79	Nov '79	Feb '80	May '80	Oct '80	Jan '81	Goal (normal work-load on hand)
Initial Processing	26,000	17,000	9,000	9,000	9,000	12,800	29,000	28,900	9,000 **
Examination	29,000*	37,000	26,900	24,850	31,850	20,400	20,150	30,650°	18,000 **
Post-examination Processing	50,000*	29,050	24,450	23,000	23,950	23,100	20,850	26,000	15,000 **
On Hold in Unfinished Bus. Corres. File/Awaiting Closing	27,000	46,950	43,750	40,250	36,350	35,600	27,450	26,350	18,000 **
Cataloging	34,000	30,150	43,700	38,350	28,550	35,000	52,100	39,600	25,000
Total	166,000	160,150	147,800	135,450	129,700	126,900	149,550	151,500	85,000
minus Goal	- 85,000	- 85,000	- 85,000	- 85,000	- 85,000	-85,000	-85,000	-85,000	
Backlog	81,000	75,150	62,800	50,450	44,700	41,900	64,550	66,500	

* The sum of these two categories comprises the 79,000 figure referred to in Ms. Ringer's testimony in 1979 before the House Committee on Appropriations.

** The sum of these four categories comprises the goal of 60,000 in the registration process referred to in Mr. Pew's testimony before the House Committee on Appropriations last year.

• 11,000 renewal claims were not included as they are to be distributed throughout the calendar year.

Next we would like to call Mr. Rene Tegtmeyer, Acting Commissioner, U.S. Patent and Trademark Office.

TESTIMONY OF RENE D. TEGTMEYER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS, U.S. DEPARTMENT OF COMMERCE, ACCOMPANIED BY MARGARET M. LAURENCE, ASSISTANT COMMISSIONER FOR TRADEMARKS; AND WILLIAM YOST, ASSISTANT COMMISSIONER FOR FINANCE AND PLANNING

Mr. **Tegtmeyer**. Thank you, Mr. Chairman and members of the subcommittee and counsel.

Let me introduce, if I may, the people who are with me today.

On my left, Margaret Laurence, who is the Assistant Commissioner for Trademarks, and on my right, Mr. William Yost, who is the Assistant Commissioner for Finance and Planning.

I would like, with your permission, Mr. Chairman, to summarize the written statement that we have submitted to the committee and ask that it be made a part of the record and give a summary of the highlights of that particular testimony, if that is satisfactory to the subcommittee.

Mr. **Kastenmeier**. Without objection, your 17-page statement will be received and made a part of the record, as well as the statement of the preceding witness, Mr. Ladd. And you may proceed as you wish.

Mr. **Tegtmeyer**. Thank you, Mr. Chairman.

Let me mention that our functions in the Patent and Trademark Office are basically those which the name of the office implies.

We administer the patent laws and the trademark laws. The patent laws are founded in the Constitution very specifically along with copyright laws. The statute is based upon that constitutional provision, and the purposes of the patent laws, of course, are to stimulate innovation, to advance technology.

This is quite an important function at the present time because it supports the country's economic needs, increases productivity and increases the country's ability to compete in international markets.

The trademark laws are based upon the commerce clause in the Constitution. They also play a very important role in that they enable companies and individuals where they are adopting new marks to adequately clear those marks and to determine their registerability and viability as marks before, in many cases, they undertake the very sizable expenses for promotion and advertising a new product and the market associated with it.

Patent application filings over the past decade have been generally flat. Filings stayed in the range of 100,000 to 103,700 for utility inventions for the years 1972 through 1979.

In fiscal year 1979 filings totaled about 100,000 utility inventions, and just over 7,000 design inventions.

In fiscal year 1980 utility application filings jumped to the 105,000 level, an all-time record, and design applications topped 7,200.

The surge of filings in fiscal year 1980 has continued into the first part of fiscal year 1981.

Whether the current filing levels represent a break in the flat trend for the past decade or just an expansion of the range within which filings have remained is yet to be seen.

In the trademarks area, the level of filings for the first 6 to 7 years of the 1970's varied in the low to mid-30,000 range.

Somewhat abruptly in fiscal year 1977 trademark filings jumped to 44,000. During continuing years of 1978 through 1980, over 50,000 applications were filed each year.

We have attempted to identify some of the reasons for this dramatic jump in trademark application filings, but have not been able to single out a principal or several principal causes.

The increase was generally across the board in all industries and by most businesses. The ratio of U.S. origin to foreign origin filings did not change.

A check with the users of the trademark registration system confirmed the increased filing level across the board in most firms but revealed no single major reason for the increases.

Patent application disposals—the result of either granting a patent or the abandonment of the application by the applicant, usually because the examiner has rejected or found unpatentable some or all of the claims in the application—for most of the 1970's exceeded application filings.

As a consequence the average pendancy time of an application dropped. Disposals averaged about 108,000 through the years 1970 through 1978. The disposal peak was reached in 1975. By fiscal year 1979 disposals had dropped to 94,000. This fiscal year, 1981, we expect approximately 87,000 disposals.

In order to increase disposals new examiners were requested in this year's budget and approved by the Congress in a continuing resolution.

Based on present funding approved for fiscal 1981 and the fiscal 1982 budget to be submitted by President Reagan next week, disposals will bottom out in the current fiscal year, rise to about 88,000 in fiscal year 1982 and, assuming constant funding and positions thereafter in subsequent fiscal years, disposals would rise to a level at about 91,000 or so by fiscal year 1985.

Assuming constant filings at 102,500 level, which is the filing level assumed in our budget submissions, the average pendancy of patent applications will continue to increase. If filings stay higher than this assumed level, as they might do, pendancy of course would rise more quickly. The pendancy level for the average patent application in the Patent and Trademark Office is 22.4 months.

Turning to the trademark operations, disposals through the 1970's was somewhat erratic as the number of trademark examiners fluctuated. Disposals were significantly below filings in fiscal years 1978, 1979, and 1980. The disposals, in fact, in fiscal 1980, were only 24,000, as compared with 52,000 application filings.

However, the accumulation of the printing process backlog did account for a large portion—some 12,000 cases, approximately—of the difference between filings and disposals, that is, the difference between the 24,000 and the 52,000 numbers I mentioned.

The disposal filing gap is expected to be significantly improved this fiscal year, 1981, with a rise in disposals to the 44,000 level. Based on the fiscal 1982 budget projections, trademark disposals will continue to rise, and are expected to match rising filings by approximately fiscal year 1983.

In the legislative area, Public Law 96-517 was enacted on December 12, 1980, and represents the most significant piece of patent legislation since the 1952 Patent Act was passed. The new law provides for reexamination by the Patent and Trademark Office of an already-issued patent at the request of any member of the public. It is anticipated that this legislation will reduce litigation and litigation costs in some cases, and reduce the litigation burden on the courts.

Also enacted and affecting the Patent and Trademark Office at the same time was new fee legislation which will increase fees and maintain a higher fee recovery rate than the Office presently is experiencing. Also part of the same legislation was a requirement for the development within 2 years of a plan for state-of-the-art computerization of Patent and Trademark Office operations.

The reexamination legislation in the new law becomes effective on July 1 of this year. Proposed rules for implementing this law were published for public comments in January.

A task force in the Office is presently preparing for implementation of the new fee structure which must be in place by October 1, 1982, and a task force has been assigned the responsibility for developing the overall computerization plan that's required in the legislation.

Of greatest significance currently in the international area has been the ongoing revision of the Paris Convention for the Protection of Industrial Property. At stake is the ability of U.S. business to adequately protect their industrial property in other countries, especially developing countries which are asking for special accommodations in the revision.

In fact, some of the accommodations being sought, in our view, are likely to be counterproductive to developing countries themselves. Specific issues include preferential treatment for developing countries, more stringent obligations and penalties on patentees in developing countries to work their patents, and new rules favoring foreign geographical names over trademarks previously registered elsewhere.

I would like to conclude my statement by highlighting various activities that the Patent and Trademark Office has undertaken in recent years, or that the Office is planning to undertake in fiscal years 1981 and 1982, in order to improve our operations.

The Patent and Trademark Office did support, first of all, passage of and is planning presently, as I mentioned, for implementation of the reexamination of fee legislation mentioned earlier. This legislation, as I said, takes a major step forward in addressing the question of patent validity and improved services.

A series of other major actions have also been undertaken to improve the quality or validity of issue patents, including the establishment a few years ago of a quality review program; the giving of examiners in the Office additional time for examination, providing for a more complete trial record of the examining process for the benefit of the courts; promulgating new reissue protest and other rules designed to improve the examination process, and the validity of patents; and institution of an office security system; and the increase of examiner training.

Other steps have been taken to improve the efficiency and effectiveness of patent and trademark operations, including the implementation of studies of methods for improving word processing, contracting out the operation, and maintenance of copying equipment in the public search room; specific actions to improve the organization and processing of trademark work in the clerical support and trademark search room areas and creation of a new position of Assistant Commissioner for Finance and Planning, which is occupied by Mr. Yost, whom I introduced before, for the purposes of introducing office planning and resource management.

The fiscal 1981 appropriation, approved by the Congress in the continuing resolution, and the fiscal 1982 budget that will be submitted next week, also provide for a series of improvement actions, including provision for additional trademark examiners, trademark computerized searching, a study directed toward computerization of patent searching, search file improvement in other respects, the creation of a computerized integrated resource management system for the Office, increased levels of patent and trademark printing to eliminate printing backlogs, and an increased effort to inventory and control foreign patents in the classified search files used by the patent examiners and the public; and miscellaneous improvements in the index to the patent classification, and in our scientific library, which is maintained for use both by examiners and members of the public.

That concludes the comments that I planned to summarize from the more complete statement. And I would be happy to answer questions that the subcommittee may have.

Mr. **Kastenmeier**. Thank you, Mr. Tegtmeyer. I would first like to yield to my colleagues. I have a couple of questions, but I'd like to yield to the gentleman from California.

Mr. **Danielson**. I thank you, Mr. Chairman. I have no questions.

I have a request. I wondered if we could have a copy of the statement you gave. It seems to have departed from the statement I have before me.

Mr. **Tegtmeyer**. Mr. Danielson, we attempted to extract from the main statement the principal points or highlights, and the format is changed considerably.

Mr. **Danielson**. That's what I'd like to have.

Mr. **Tegtmeyer**. We'd be happy to provide you with a copy of the statement. I did make some comments that are not contained in the principal portion of the statement, which I presume will be available with the printed record of the hearings.

Mr. **Danielson**. But they will not be typed up for several months, and I would like to know it this year.

Mr. **Tegtmeyer**. Yes, sir. We will leave at the conclusion of the hearing a copy of it.

Mr. **Kastenmeier**. The gentleman from Virginia.

Mr. **Butler**. I have no questions.

Mr. **Kastenmeier**. The gentleman from Massachusetts.

Mr. **Frank**. No questions.

Mr. **Kastenmeier**. I have just a couple of questions. Much was made last year of the problems of the Patent Office. When we did treat the bill which ultimately became law, we did not create an independent Patent Office.

Do you have any view about the desirability of the creation of such an independent Patent Office, or are you able to achieve all the reforms indicated without changing the status of the Office?

Mr. TEGTMEYER. In response to that question, Mr. Chairman, I think the only observation I would have is to refer to a statement that Secretary Baldrige made in response to some questions that Senator Schmitt asked following his confirmation hearing, in which he indicated that he believed that management principles suggested grouping organizations that have like functions into departments. And he observed that the Patent and Trademark Office seemed to fit within the scope of functions that are encompassed by the Department of Commerce, and that certainly the creation of an independent agency status should be done only for very compelling reasons. I think that was the gist of the answer that he gave to the question by Senator Schmitt, and we, of course, support this statement of policy.

Mr. KASTENMEIER. In fact, he would arrive at the policy—this administration has not changed the policy of the past administration. I think that was essentially the policy of the past administration.

Can you describe the effect of the recent hiring freeze on the Patent and Trademark Office, if any?

Mr. TEGTMEYER. Yes, sir. We had had, of course, some hiring limitations prior to the current freeze. We had initiated beginning last summer, approximately the middle of the summer if I recall correctly, a limitation on hiring that permitted us to replace one out of every two attritions that we experienced.

And then more recently a total hiring freeze was imposed. We had, according to our budget plan for fiscal year 1981, the funding and positions in the budget to hire approximately 167 examiners, of which 60 were attrition replacements and the balance of 107 represented a net increase in the size of the patent examining corps. As a result of the various freezes, we have hired 19 of the 167 examiners to date, and the balance have not yet been able to be hired.

Officewide, we presently have a full-time permanent staff of about 2,430. In addition, we have approximately 250 part-time and temporary employees on board. We are roughly 250 below the positions that were identified in the budget for fiscal 1981.

Mr. KASTENMEIER. Well, reflecting back on the concern that many witnesses and the subcommittee had about the backlog and the statistics that you recited earlier in your prepared testimony, that doesn't bode too well, does it? It doesn't look like you're going to be catching up with 19 examiners replacing—you said, 60, by attrition. That's rather apparent.

Mr. TEGTMEYER. We have been losing in recent years approximately 60 examiners a year through retirement or departure from the examining corps through other reasons.

Mr. KASTENMEIER. Is that an acceptable level, as an administrator?

Mr. TEGTMEYER. that's a very good level of attrition, because some years ago our attrition rates ran 15 to 22 percent in the examining corps. The present level of around 6 or 7 percent that we have experienced in recent years has been very helpful to us, because we can retain experienced examiners, and I think it has significantly aided increased quality and productivity in the Patent and Trademark Office.

Mr. **Kastenmeier**. But at this moment in time, given the freeze and other factors we have discussed, what is the outlook currently for the backlog?

Mr. **Tegtmeyer**. The outlook, of course, will depend upon the ceiling position and the budget positions that result from the President's new fiscal 1982 budget. But we are presently working overtime in the patent examining corps, and that overtime will keep production up pretty much along the lines of what was estimated to be the production this fiscal year in the budget. Thus, the hiring freeze will only delay the hiring of new people, rather than reducing production significantly this year.

Mr. **Kastenmeier**. Well, there are agencies and agencies, and the situation, as I remember, last year, was one of great urgency with respect to the Patent Office. And in a number of respects that was part of the big move to make it independent.

And the thought may be, well, that would help, although I think most of us concluded it was a lack of resources. You now indicate security has improved; you have a security officer, and the like.

I am concerned, even though this is not the appropriate subcommittee—that if these resources, both in manpower and computers and other resources, are not available in this budget for you, we would like to know it, because I think—let's not kid ourselves, you're not going to be able to perfect the Patent Office without additional resources.

Mr. **Tegtmeyer**. The President's revised budget will be forwarded, as I indicated, next week up to the Congress, and I believe that will give the information you are concerned with.

Mr. **Kastenmeier**. That's a very cryptic answer, I must say.

Mr. **Tegtmeyer**. We have, as I mentioned——

Mr. **Kastenmeier**. I guess I can't expect you either to be candid or forthcoming with this committee in that connection, but I think you do understand what concerns the patent community out there, and why we were urged so strongly to create an independent Patent Office. We were told that, frankly, the Patent Office was a mess. I could use stronger terms, you know.

But if, in fact—and I don't know what the situation is—you will not have the resources to increase your examining corps or to enter into a computerization, a meaningful one, of the Patent Office, then I think we can really expect merely a temporary means to overtime and the like to meet the long-range objectives of making the Patent Office a model of efficiency in terms of what is expected, certainly, from the outside.

Mr. **Tegtmeyer**. Mr. Chairman, if I could comment on what you have mentioned. First of all, once the hiring freeze is lifted, presumably we will be able to fill the various positions in the patent examining corps, where they have been provided. The overtime in the meantime will keep the production up until such time as the new examiners are hired.

It's true that overtime is only a temporary measure; yet, for us, it's a very efficient way of operating, because the examiners who work the overtime are paid at a lower salary rate on overtime than they are paid on regular time. And a limited amount of overtime—a reasonable amount of overtime—so that they can work that overtime efficiently and not be overtaxed is, and has been for us, a fairly efficient way to operate, albeit only a temporary measure, as you mentioned.

Mr. KASTENMEIER. One other question, Mr. Tegtmeyer. Since there was a very substantial page 2 article on the Supreme Court case of *Federal Mogul*—can you briefly tell us anything about it in terms of implications to be drawn from it? Was the Patent Office in any sense a party to the litigation? Or what, if any, implications might we draw from that particular case?

Mr. TEGTMEYER. Yes, Mr. Chairman, we were a party to that particular case, because it resulted originally from the holding by the examiner in the Patent and Trademark Office that the subject matter sought to be patented, which included claims in part directed toward or including a computer program or algorithm that was used in molding products for rubber was not patentable subject matter.

It was turned down as patentable subject matter by the examiner. That decision was appealed to the Court of Customs and Patent Appeals by the applicant. The Court of Customs and Patent Appeals reversed the examiner's holding that the subject matter was not patentable, and the Supreme Court decision came out yesterday affirming the decision of the Court of Customs and Patent Appeals.

Therefore, the process including a computer program was considered by the Supreme Court to be patentable subject matter. This decision will have ramifications for the Patent and Trademark Office. And we are going to have to study the particular opinion that was written by the Court. And we are going to have to evaluate its effects in light of earlier decisions—*Gottschalk* v. *Benson and Parker* v. *Flook*—both of which also dealt with computer programing subject matter. There is another case still pending before the Court—the *Bradley* case, which was heard on the same day as the *Diehr* case that they decided yesterday. A decision in that case also will help define the parameters of what is considered patentable subject matter where computer programs are involved.

Mr. KASTENMEIER. Apart from the merits of the case would I be correct in concluding that it will increase the burden on the Patent Office?

Mr. TEGTMEYER. Yes, I think it will. We have some questions as to what the degree of increase in burden will be, and that will depend upon the interpretation of the opinion or its breadth in light of the other cases mentioned.

Mr. KASTENMEIER. Thank you very much. No further questions? We thank you, Mr. Tegtmeyer. Undoubtedly at some point we will want to have you come back, or your successor, if there is in fact a new Commissioner appointed in the near future. But I think I understand the reasons you cannot perhaps be more candid and more helpful at this particular moment in time than you have been this morning. Nonetheless, we still have an interest in these matters.

Thank you.

[The complete statement of Mr. Tegtmeyer follows:]

STATEMENT BY RENE D. TEGTMEYER
ACTING COMMISSIONER OF PATENTS AND TRADEMARKS
U.S. DEPARTMENT OF COMMERCE
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON COURTS,
CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE
MARCH 4, 1981 AT 10:00 A.M.

Mr. Chairman:

I welcome the opportunity to appear here today before your Subcommittee and to discuss the patent and trademark system and the operation of the Patent and Trademark Office. I will attempt to set forth a description of the functions of our Office, to refer to some of our current problems, and to offer some thoughts regarding the future of the industrial property system.

The patent system in the United States is founded in the Constitution. Article 1, section 8 gives the Congress the power to promote the progress of the useful arts by securing for limited times to inventors the exclusive right to their discoveries. The first Congress of the United States enacted the first patent law in 1790.

During the almost two centuries that followed the enactment of the first patent law, the patent system in the United States has served our Nation well. The patent system has provided the Nation with the incentive to invest time, energy and money in new and more productive technology.

A relevant and effective patent system is at present more critical to our national well-being than it has been at any point in our past history. The United States is faced with lagging productivity which in turn aggravates the economic problems which the United States is now experiencing. Our productivity problem can be addressed with increased industrial innovation. It is a strong and effective patent system and the monetary rewards associated with strong and effective patents that will assist in encouraging Americans to engage in the innovation process. A strong patent system is especially important to small businesses which have been shown to be the source of more than half of our innovation and almost all radical innovation.

The solutions to many of our problems, including our dependency on foreign oil, can be found through increased domestic innovation. As I consider the patent system to be an indispensable part of the solution to many urgent national problems, I consider it especially timely to be able to discuss with you today our efforts to ensure that the United States patent system is equal to the task.

The Patent and Trademark Offices is located in Arlington, Virginia in an area called Crystal City adjacent to National Airport. At present we have about 2,500 employees. During the current fiscal year, we expect to spend approximately 118 million dollars in appropriated funds. About one-fourth of that amount will be returned to the Treasury in fees collected from patent and trademark applicants and users of our services.

The Patent and Trademark Office has responsibilities in two general areas:

(1) the examination and issuance of patents, including the related collection and dissemination of the technical information disclosed in patents, as mandated by Title 35 of the United States Code; and

(2) the examination and registration of trademarks in accordance with the requirements of the Trademark Act of 1946.

PATENT APPLICATION EXAMINATION AND ISSUANCE OF PATENTS

The examination of patent applications is the major activity of the Office. The patent law is designed to promote technological progress by providing incentives to make inventions, to invest in research and development, to commercialize new, improved or less expensive products and processes and to disclose new inventions to the public instead of keeping them secret. The incentives provided by the patent law to achieve these ends arise from the grant of a patent to the inventor which enables the inventor to exclude others from making, using or selling an invention for a period of 17 years. The patent may be granted only after an examination by the Patent and Trademark Office to determine whether the invention meets the statutory criteria for patentability.

The examination conducted by the Patent and Trademark Office precludes the issuance of a patent on about one-third of the applications filed and results in a narrowing of the scope of protection, as defined by claims in the applications, in most of the other two-thirds of the applications which mature into patents. The examination process also enables patent owners, and their competitors, to better gauge the strength of patent rights. A central examination system as we have in this country is far more efficient than leaving the determination of the strength of patent rights to individuals, as is the case in countries which have merely a registration system.

The examination is done by a corps of about 920 professional examiners including supervisors. Patent examiners must have a scientific or technical education and a significant proportion of them are lawyers as well. Each examiner is a expert on a given technological area. In examining an application the examiner determines whether the disclosure of the invention is complete and that the invention is new, useful and nonobvious in the light of the known technology. The most difficult part of the examination is determining with a degree of certainty whether the invention is new and nonobvious. To determine this the examiner makes a search of the Office's files of prior U.S. and foreign patents and relevant technical literature.

During fiscal year 1980 we received about 105,000 utility patent applications and over 7,000 design patent applications. The 1980 utility patent application filing level was approximately five percent greater than the 1979 filing level and higher than the range of 100,000 to 103,700 filings which had been experienced during the 1970's. The higher filing level of 1980 has been continuing this year. In fiscal year 1980 the Office disposed of approximately 90,000 utility patent applications and over 6,000 design patent applications. The disposal of utility patent applications had averaged over 108,000 annually for the 10-year period 1969 through 1978. In 1979 the Office disposed of 94,000 applications and in 1980 about 90,000 applications. This downward trend in disposals should end in fiscal year 1981 with the disposal of approximately 87,000 applications.

Of the 61,000 patents issued last year, some 38,000 were issued to U.S. nationals. This is the fewest patents received by U.S. nationals in the past 17 years other than for one year during which the issuance of patents was sharply curtailed due to delays in the printing process. On the other hand, the number of patents issued to foreign nationals has risen over the past 17 years both in percentage from 20 to 37.7% and in number from 9,000 to over 23,000.

One of the major problems that has been facing the Office in the past two decades has been the backlog of unexamined patent applications and the resulting long pendency time between the filing of an application and the issuance of a patent. Since the average pendency of patent applications in the early 1960's was more than 3 years, a concerted effort was made in the Office to reduce this pendency through the use of new examining and processing techniques and an increase in the number of examining staff. A goal of 18 months pendency was established which was almost achieved in 1976 and 1977. Unfortunately since that time there has been a gradual increase in the pendency time until it now takes an average of approximately 22.4 months to dispose of a patent application. This problem, which is one of the major problems the Office faces in the patent application examination area, is continuing to be addressed.

The 22.4-month figure for current application pendency does include the times when the Patent and Trademark Office is waiting for the applicants to respond to correspondence and to pay the final fees as well as for the printing of the patent and for other processing. The Office has paid a great deal of attention to reducing the processing times within the Office to a minimum with the given resources.

While the major focus has been the quantitative aspect of patent application processing, the Patent and Trademark Office has also paid close attention to the qualitative aspect of the examination. For the past seven years the Patent and Trademark Office has had a quality review program which involves taking a four percent sample of the applications which are allowed by examiners and having them checked by a group of experienced examiners before the patents are granted. This program permits the Office to maintain, to some degree, a measure of changes in the quality of the patents that are being granted. Corrective action can then be taken for deficiencies that are identified, and the applications in the sample which are found to be deficient can be reexamined.

During the past several years other programs have been undertaken to improve the quality of issued patents. These include a search file integrity improvement program, giving the examiners additional time for examination, establishing procedures to obtain a more complete record of the examination process, establishing a series of new rules to improve the examination process and the validity of patents, instituting an Office security system, developing a full-text search system and increasing examiner training.

At present examiners spend approximately 15 hours on the examination and processing of a patent application. The examination time spent in complex technologies is higher than this figure whereas the average examining time in less complex technologies is less.

Several years ago a series of changes were made in the Rules of Practice governing patent examination and appeal procedures which were intended to improve the quality and reliability of issued patents. The rules afford patent owners a relatively inexpensive way to have their patents reexamined in light of prior art that was not considered before by the examiner. The reexamination of the patent is instituted by the owner making an application for the reissuance of his patent. The Office determination of patentability of the reissued patent is no more binding on a court that later considers the patent, but courts are given the benefit of the examiner's thinking in regard to prior art not previous considered.

As a result of a law passed by the 96th Congress (Public Law 96-517) it will be possible in the very near future for a person other than the owner to obtain a reexamination of a given patent. After July 1, 1981 it will be possible for anybody to bring to the attention of the Office prior publications or patents which have a bearing on the patentability of an issued patent. The new procedure should result in a substantial reduction of litigation costs bearing on the validity of a patent in light of publications or patents not considered by the Patent and Trademark Office during the examination process which led to the grant of the patent.

The cost of the reexamination process will be fully borne by the person requesting the reexamination. While the recovery of the fees for the reexamination process should have no on-going adverse budgetary impact, as of this time no new positions have been provided for undertaking the reexamination activity. Consequently, the undertaking of the reexamination activity will have some adverse effect this year and next year on examining production due to placing examiners on this new activity. We are presently studying the impact of the reexamination process on the operations of the Office.

The collection, classification and dissemination of technology disclosed in patents is an important activity of the Office. Every patent application must contain a written description of the invention, sufficient to enable a person skilled in art to make and use the invention. The application must also set forth the best mode of carrying out the invention. The issued patent contains a technical disclosure which is invaluable for any person wishing to fully understand the invention. This technical disclosure is printed and widely disseminated by the Patent and Trademark Office.

The patent applicant, in exchange for the exclusive rights which a patent affords, is willing to disclose the technical information concerning the invention rather than keeping the information as a trade secret. It is generally acknowledged that much of the information found in patents is not found elsewhere in the literature. The patent disclosure permits researchers to avoid the needless duplication of previous research efforts and allows researchers to build on the research of others.

Each year the Patent and Trademark Office distributes over 8 million copies of patents. Approximately half of the these copies are sold to the public at the statutory fee of 50 cents apiece. Every day the Office fills about 12,000 orders for copies of patents. Copies of all issued patents are also supplied to 35 depository libraries throughout the United States. Copies of all patents issued are sent to all major foreign patent offices in exchange for copies of their patents. Half a million copies a year are also added to the search files used by the examiners and the public.

A program, which was provided for in this year's budget, permits the Patent and Trademark Office to provide for terminal systems linking the depository libraries to a Patent and Trademark Office data base. The Patent and Trademark Office is also providing a number of its data bases to the National Technical Information Service (NTIS). NTIS is making the data bases publically available with the expectation that commercial firms will provide for improved access to this information.

The search files of the Patent and Trademark Office used by the examiners contain about 24 million documents. The files are divided according to subject matter into some 350 classes that are further divided into some 107,000 subclasses. The search files are constantly subject to reclassification as subclasses grow in size and technology changes. A major problem of the Office is to keep the search files complete and current which is critical to the examination process and the determination of patentability of applications based on documents retrieved by the examiners. An attempt is being made to improve the integrity of the files. The Office is also engaged in a two-year study, required by the Congress (Section 9, Public Law 96-517), regarding computerizing the patent and trademark search files, the patent classification system and other operations of the Office.

TRADEMARK APPLICATION EXAMINATION AND REGISTRATION OF TRADEMARKS

The administration of the federal trademark registration statute, the Trademark Act of 1946, is also the responsibility of the Patent and Trademark Office. A trademark is a name or symbol used to identify the source or origin of goods and distinguish them from the goods of others. Although examination of trademarks accounts for slightly over six percent of our budget, many companies feel their trademarks are their most valuable assets.,

Trademark registration is important in helping to protect business investments and in avoiding the deception or confusion of consumers. The registration of a mark in our Office confirms the common law rights in the mark that the trademark owner has obtained by using the mark in commerce. Trademark registrations can be renewed indefinitely so long as the mark remains in use.

Last year over 52,000 applications for trademarks were filed. During the period 1970 to 1976 trademark application filings ranged from about 33,000 to 37,000 applications. Over 44,000 applications were filed in 1977 and over 50,000 applications in 1978, 1979 and 1980. Foreign filings were an increasing portion of this number and now comprise over 10 percent of the total trademark applications. About 70 percent of the applications received are finally registered.

A downward trend in the disposal of trademark applications occurred during the period 1978 to 1980 from almost 40,000 disposals in 1978 to about 24,000 disposals in 1980. The 1980 figure was artifically low due to a printing backlog. The disposal of work by the trademark examiners in 1980 was in fact greater than in 1979. About 44,000 disposals are expected this fiscal year and by fiscal year 1983 it is expected that the disposals will equal the number of applications filed that year.

The trademark application examining procedure is roughly analogous to that found in examining a patent application. At present some 77 trademark examiners check applications for compliance with formal requirements and to determine whether there is likelihood of confusion with other marks.

Currently it takes approximately 10 months after filing a trademark application for it to be taken up for consideration by the Office. This figure has been reduced from a high of 11.5 months at the end of the previous fiscal year. Trademark pendency unfortunately rose approximately 7 months in the last year with it now taking approximately 25 months from filing to obtain a registration. The effect of an enlarged trademark examining staff will become apparent as the examiners become more experienced resulting in a reduction in the pendency time over the long run, following a small short-term further rise.

Under the trademark law, unlike the patent law, there is a procedure by which interested parties may oppose the registration of a mark. Another procedure, which is analogous to the new reexamination procedure for patents, permits interested parties to petition for cancellation of a mark already registered. These trademark proceedings are handled by our Trademark Trial and Appeal Board.

RECENT DEVELOPMENTS

There are a number of initiatives which have resulted from the recent passage of Public Law 96-517. In addition to the reexamination procedure, which is referred to above, the new law also provides for a revamping of the patent and trademark fee structure. It is anticipated that a new fee structure will take effect no later than fiscal year 1983 and will provide for a recovery of 50 percent of the cost of patent processing, 50 percent of trademark processing and 100 percent of the cost of all other Office services. Studies are presently underway by an Office task force to determine the costs of patent processing, trademark processing and other Office services.

One of our current concerns is a legislative initiative to implement the Trademark Registration Treaty (TRT) which was negotiated and signed by the United States in Vienna in 1973. The TRT is an international filing arrangement under which a single international registration is used to secure national trademark registration effects in a number of member countries. The Treaty was transmitted to the Senate with a view to receiving its advice and consent to ratification in 1975, but further consideration of the TRT is being deferred. Several years ago the General Accounting Office reviewed the draft bill implementing the TRT and recommended that a survey of trademark owners be conducted in order to obtain information which would permit a more accurate estimate of the cost and benefits of the TRT and its proposed implementing legislation. A survey was conducted during the course of 1980 and the results are continuing to be evaluated and discussed.

The Patent Cooperation Treaty (PCT), which permits a United States applicant to file a single English language application in the standard format in the Patent and Trademark Office and have that application mature into separate national applications in as many of the present 30 member countries as the applicant has designated, has been in effect for almost 3 years. The use of the PCT by United States inventors continues to increase with 1,647 PCT applications filed last year. This was a 59 percent increase in filings over the previous year. Several major countries including Canada and Italy are not yet party to the PCT. It is expected that when Canada and Italy adhere to the PCT, filing levels in the United States will increase dramatically.

The Patent and Trademark Office, in cooperation with the Department of State, is involved in deliberations involving a number of other industrial property matters. A revision of the Paris Convention for the Protection of Industrial Property is a major activity. The Paris Convention is a multinational treaty which has been in effect since 1883 and now has 89 member States. The United States has been a member since 1887. This treaty is administered by the World Intellectual Property Organization, a specialized agency of the United Nations with headquarters in Geneva, Switzerland.

The Paris Convention affords to United States nationals certain benefits in obtaining protection for their industrial property in foreign countries. The Convention establishes the fundamental principle of national treatment according to which member States treat foreign nationals at least as well as they treat their own nationals in regard to industrial property protection. In addition, the Convention also makes available valuable property rights in the filing of patent and trademark applications and establishes certain minimum levels of protection for all adherents.

In recent years, however, third world nations have perceived the Paris Convention as favoring developed nations and have been demanding its revision in several respects including providing preferential treatment for developing countries and new rules favoring their geographical names over trademarks previously registered elsewhere. A major demand made by developing countries, which has been opposed by the United States, would permit a country to grant an exclusive non-voluntary license to a patent which is not worked within a short period of time. This demand would not only adversely affect the international competitiveness of our industry but would also seriously impede the transfer of technology to developing countries.

A Diplomatic Conference was held last year with almost the entire period of the Conference being used to argue whether or not the traditional unanimous vote for amending the Convention would be preserved. The Conference, with the United States objecting, approved a rule which called for amending the Convention by significantly less than a unanimous vote. A second session of the Diplomatic Conference will be held in the fall of this year.

During 1980 the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Protection entered into force. The United States was one of the initial members. The Budapest Treaty permits an applicant for patent on a microbiological invention to utilize a single international depository among various designated depositories when filing patent applications in any member country. This eliminates the need to make more than one microbiological deposit to obtain patents in the member countries.

During the course of the past year the Supreme Court in the Diamond v. Chakrabarty decision held that the present patent law authorizes the granting of a patent on a living microorganism which the inventor had developed through genetic engineering techniques. The decision is seen to have potentially far-reaching consequences for industry, and to eventually have some consequences for the Patent and Trademark Office. The Office is currently awaiting a decision from the Supreme Court regarding the patentability of computer programs.

ADMINISTRATIVE IMPROVEMENTS

During the past several years a number of steps have been taken to improve the efficiency and effectiveness of Patent and Trademark Office operations. These include studies of methods for improving work processing, contracting out the operation and maintenance of copying equipment in the Public Search Room, and various actions to improve the organization and processing of trademark work in the clerical support and search room areas. To improve the planning function of the Office the new position of Assistant Commissioner for Finance and Planning was created and filled.

OUTLOOK

With the FY81 budget as approved and the FY82 budget which will be submitted next week, a series of actions will be possible to address some of the existing problems of the Patent and Trademark Office. These actions include the hiring of additional trademark examiners, trademark computerized searching, a study of the computerization of patent searching, search files improvement, creation of an integrated resource management system, elimination of patent and trademark printing backlogs, inventory and control of foreign patents in the classified search file, improvements in the index to the U.S. Patent Classification and in the Scientific Library maintained for use by the examiners and the public.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that you and members of your Subcommittee might have.

Mr. KASTENMEIER. As our last witness this morning, I'd like to call Clarence L. James, Jr., who is the Chairman of the Copyright Royalty Tribunal.

Mr. James, we are very pleased to have you here. I know you have a very brief statement with some attachments, and without any objection, your statement and attachments will be accepted for the record. You may proceed. If you want to give your brief statement, we will be pleased to hear it.

TESTIMONY OF CLARENCE L. JAMES, JR., CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL

Mr. JAMES. Thank you, Mr. Chairman. I believe my brief statement which accompanied the Tribunal's 1980 Fiscal Annual Report that was submitted to the committee adequately and correctly reflects the current status of matters at the Tribunal. As a footnote to that submission, I would like to add that I, as well as the other four Commissioners, have served on the Tribunal for approximately 3½ years, and although we are not experts on copyright law, we are possibly the only living experts on the inner workings of the Copyright Royalty Tribunal.

During that time, the Tribunal has held proceedings on all the aspects authorized by the 1976 act, with the exception of a jukebox distribution proceeding. From my experience during this period, I have developed some personal views, opinions, and observations which may or may not be shared by other members of the Tribunal. If the committee desires, I will be willing at the appropriate time to share them with the committee.

Mr. Chairman, I at this time am prepared to answer any questions of the committee or proceed as you direct.

Mr. KASTENMEIER. Thank you for that unusually brief statement. In view of that fact—let me first say that we will encourage you to speak as an individual, not necessarily for other members of the Tribunal. But where you find that any statement that you make is, to the best of your knowledge, endorsed by the Tribunal as a whole, you may so identify it. In other respects you speak as an individual who is chairman, not necessarily having been specifically authorized by other members of the Commission to represent their views.

With that in mind, in view of the fact that the subcommittee is receiving suggestions that the Tribunal be given more authority, for example in the cable television area, what is your personal view on whether the Tribunal, as now constituted, is the best method of dealing with compulsory license?

Mr. JAMES. Thank you, Mr. Chairman.

I would like the record to reflect and for the members of this committee to understand that my comments are not as Chairman of the Copyright Royalty Tribunal. The views and opinions I am about to express are my own; however, some of my comments will reflect action or at least agreement by a majority of the members of the Tribunal.

In my opinion, the Tribunal is not required or needed and is purely unnecessary to determine reasonable terms and rates of royalty payments for noncommercial broadcasting under section 118 of the act. Thomas C. Brennan, Senior Commissioner of the Tribunal, prior to his current position served as chief counsel to the Senate subcommittee which processed the Copyright Revision Act. He has been actively involved in cable regulatory matters, and in my opinion is an expert on all copyright issues. Commissioner Brennan was the architect of a report on the use of certain copyrighted works in connection with noncommercial broadcasting, which was submitted to this committee by the Tribunal on January 22, 1980.

Mr. Chairman, if it's appropriate, I would like to insert that report in the record at this time and ask that it be made a part of this proceeding.

Mr. KASTENMEIER. Without objection, we will receive that statement. If you could identify it in terms of what it is?[1]

Mr. JAMES. I brought 40 copies, Mr. Chairman. You have already received it. It's dated January 22. We submitted it January 22.

Mr. KASTENMEIER. I am told by counsel that each one of us has the Annual Report of the Copyright Royalty Tribunal for fiscal year ending September 20, 1980, and appended to that is the statement of Mr. Brennan.

Mr. LEHMAN. I'm not sure it is.

Mr. KASTENMEIER. I don't see it here.

Mr. LEHMAN. I have what you submitted to us which is the annual report, but it doesn't include the other one.

Mr. DANIELSON. Some gentleman just left one here for me. I don't know where the other 39 copies are.

Mr. JAMES. When I talked to staff counsel on Monday, he indicated they had it, so I don't know.

Mr. LEHMAN. We didn't realize you wanted it to be part of the record.

Mr. JAMES. Just in case, I brought extra copies.

Mr. LEHMAN. Great.

Mr. KASTENMEIER. Do you offer this approvingly? That is to say, do you agree or disagree with the remarks?

Mr. JAMES. My comments will explain that later, Mr. Chairman.

---

[1] See app. A.

Mr. **Kastenmeier**. All right. Without objection it will be received and made a part of the record, although I note this already is part of our record.

[See app. B.]

Mr. **James**. The conclusions reached by Mr. Brennan writing for the Tribunal, a view which I share and strongly support, reads in part, and I quote:

> On the basis of its review of the experience with section 118, the Tribunal concludes that the compulsory license is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with traditional functions of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions.
>
> The copyright system can advance constitutional objectives only if the exclusive right of authors and copyright proprietors are preserved. Reasonable exceptions to these exclusive rights are justified when necessary to promote public policy. The Tribunal believes that those engaged in communications should be particularly sensitive towards the interference of the Federal Government in the absence of compelling need.
>
> The Register of Copyrights advised the Congress in 1975 that the proposed public broadcasting compulsory license was not "justified or necessary." The Tribunal believes that the experience of the intervening years confirms the correctness of the Register's position. It is therefore the recommendation of the Tribunal that the Congress reconsider the public broadcasting compulsory license at an appropriate time.

In my opinion, Mr. Chairman, I believe the appropriate time is now. In the event Congress in its wisdom decides to maintain the compulsory license under section 118, I would recommend that it establish a procedure whereby the public broadcasting would pay to the performing rights societies a sum which is based on public broadcaster's revenue and calculated as a percentage of the royalty rate or fee which currently exists between the commercial broadcasters and the performing rights societies.

The elimination of the compulsory license to permit owners or users the right to establish a value in the marketplace or the adoption of a rate tied to the commercial fee would effectively eliminate continuous interference by the Federal Government and avoid periodic review of royalty rates by Congress. It would also eliminate any need for future review by the Copyright Royalty Tribunal.

In my opinion, Mr. Chairman, the Copyright Royalty Tribunal is not needed or required to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116. Under section 115, history will support that there is possibly an overriding need for a compulsory license for making and distributing phonorecords. However, the continuous and periodic interference of the Federal Government in adjusting the rates totally at the taxpayers' expense, in my view, is undesirable, unwarranted, and unnecessary.

In my opinion, a system can be created by Congress which would totally eliminate the interference by the Federal Government and in particular the Copyright Royalty Tribunal.

This committee is aware that the Tribunal recently concluded 42 days of hearings on the mechanical rate. It is my understanding that during the revision of the copyright bill only 5 days of hearings were devoted to that subject. At our hearing the copyright owners made a proposal and submitted evidence in support of the same—that the mechanical rate could and should be based on a percentage of the suggested retail list price of phonorecords.

Mr. Chairman, I have that proposal, and if it is appropriate I can insert that proposal in the record and have it made a part of this proceeding.

Mr. Kastenmeier. Without objection, it is received.

[See app. C.]

Mr. James. The proposal that the mechanical rate be based on a percentage of the suggested retail list price of phonorecords may be unique to the United States. However, sufficient evidence was submitted to the Tribunal which clearly established that the percentage system is widely used throughout the world as a basis for arriving at royalties.

If Congress were to establish a percentage system, it would effectively eliminate the necessity and need for periodic review of royalty rates by any government agency or by Congress. If the price of the record goes up or down, the royalty due and payable will also go up or down. Thus by appropriate action of the Congress, another function of the Copyright Royalty Tribunal can be eliminated.

Under section 116 of the act, "Jukeboxes", the Tribunal held 8 days of hearings and concluded that adjustment was appropriate. It is my view that the present requirements under section 116 for obtaining a compulsory license should be maintained. It should, however, be called something else.

Congress under the act set the rate of $8 a box. The Tribunal adjusted the rate to $25 a box, effective January 1, 1982, with an increase to $50 a box commencing on January 1, 1984. The Tribunal further established that the rate would be further adjusted on January 1, 1987, based on a change in the cost of living as determined by the Consumer Price Index from February 1, 1981, to August 1, 1986.

It is my opinion that Congress can and should adopt a fair and reasonable rate based on marketplace value with annual adjustments based on the Consumer Price Index or some other index for the jukebox industry. If Congress were to take such action, it would eliminate the need for future interference by Federal agencies, and another function of the Copyright Royalty Tribunal.

Because the Tribunal has not held its first jukebox royalty distribution proceeding, I believe it would be inappropriate for me to discuss my personal views on that issue at this time. Under the statute, the parties have agreed to the distribution of the first fund. They have not for the second fund. We therefore will be starting jukebox distribution hearings in the near future.

My opinion, however, is that the fees collected can be annually distributed without the necessity of distribution proceeding by the Copyright Royalty Tribunal. Such a system would permit copyright owners the opportunity to receive their payment the same year payment is made.

Mr. Kastenmeier. May I interrupt, since another member of the panel has a question. You have given us a lot of printed material, but we don't have the statement you are now making.

Mr. James. Mr. Chairman, maybe it's appropriate if I explain why. I got the word that I was to appear here when I was in California. My 81-year-old father had a massive stroke 2 weeks ago;

I was in California, and then a week later my father-in-law in Tuscon had a stroke, so I didn't fly back to Washington until the "Red Eye" on Monday when I met with your staff, and this was just completed at 9:45, and I made editorial notes in the back of the room.

I can have them prepared. It's not an excuse, but an explanation of why this was not done ahead of time.

Mr. **Kastenmeier**. Sure. And certainly you may continue, Mr. James. We would appreciate it if later today, the next day or so, you would reduce it to multiple copies and make it available so that the subcommittee, even those not here today, have it available.

Mr. **James**. I will be more than willing and anticipate that I would do that, Mr. Chairman.

Mr. **Kastenmeier**. The reason I make the point is that your testimony is unique and not necessarily expected. It is important, and not to have it in any form I think is a disadvantage to us who want to consider it.

Mr. **James**. I can appreciate that, Mr. Chairman, and I apologize for not having it here earlier.

Mr. **Kastenmeier**. You may proceed, sir.

Mr. **James**. The committee is also aware that the Tribunal just completed rate adjustment proceedings for cable. My personal view is that Congress should eliminate the compulsory license so the marketplace can set the true value of second transmission. The compulsory license requires payment to copyright owners for use of the property by others, preventing free negotiation in the marketplace as to value. The issue of true value in the marketplace must be established by Congress, in my opinion.

The legislative history is clear that there is absolutely no economic justification for the statutory schedule initially adopted by Congress for the cable industry. The rates for cable were not adopted on the basis of any objective standards. The review of the rate by the Tribunal under the statute was greatly limited by Congress. Congress did not authorize the Tribunal to adjust the rate based on marketplace value, nor should it. That must, in my opinion, be done by Congress. The Tribunal could only adjust the cable rate to reflect the monetary inflation or deflation or reflect the average rate charged cable subscribers for basic service.

Mr. Chairman, I'd like to note here that in all other statutory licenses under the act the Tribunal had full jurisdiction to review and possibly adjust the rate, based on the record developed during the Tribunal hearing. This is not so in cable. Because the cable owners and copyright owners are not free to negotiate, the only fair, logical, and equitable approach to establish a fee, if the compulsory license must be retained, is on the basis of the marketplace value. Again, that rate can and should only be established by Congress. If Congress were to establish such a rate in my opinion it must be established on a system-by-system basis instead of the currently industrywide practice.

In my view, an industrywide practice is both unfair and inequitable to the copyright owners. As part of their submission at the conclusion of the cable rate proceedings the copyright owners submitted a proposal as to how a system-by-system rate could be implemented.

I might add here, Mr. Chairman, that the proposed findings of fact and conclusions of law filed by the parties in the various Tribunal's proceedings might be of help and assistance to this committee and this staff and, if requested, they will be made available. These are after all, our proceedings, so if the staff would need them, we would make them available.

Mr. **KASTENMEIER**. I appreciate the offer. I'm not sure to what extent they are already available or if they are in print. Are they?

Mr. **JAMES**. They are not in print.

Mr. **KASTENMEIER**. Not in print?

Mr. **JAMES**. No.

Mr. **KASTENMEIER**. Well, I think what we ought to do is have our staff review them for us and determine which are useful in terms of problems we confront with respect to the Tribunal and copyright matters generally.

Mr. **JAMES**. I will be happy to furnish them, Mr. Chairman.

Mr. **DANIELSON**. Mr. Chairman, may I respectfully suggest that unless they are too voluminous that a copy of them be lodged with the committee staff, not necessarily incorporated with our record. We'll have a chance to become familiar with them and it may well be we may want them in the record, but later on.

Mr. **KASTENMEIER**. An excellent idea.

Mr **JAMES**. Thank you. In the event Congress establishes a reasonable marketplace rate applied on the system-by-system basis with annual or semiannual adjustments, tied to the Consumer Price Index or some other index, it could, in all likelihood eliminate the need for further interference by a Federal agency and avoid periodic review by Congress. In the event it becomes necessary to resolve any issue related to the cable rate it is my opinion—this can be effectively done at a savings to taxpayers by a part-time administrative law judge, possibly in the Department of Commerce. The copyright owners have participated in one cable distribution proceeding and are currently preparing for another. I would imagine if the copyright owners were put to the ultimate test, they could develop a system or formula which Congress could enact that would eliminate the necessity and need for distribution proceedings and continuous Government involvement.

I believe that a system can be developed and enacted by Congress that would provide for the immediate distribution of the funds held in the Treasury to the copyright owners. Payment to the copyright owners should be made at least within 1 year after they are paid, not 4 or 5. In the event distribution problems would arise, they also can be effectively handled by a part-time administrative law judge. At the present time, because the Tribunal's first distribution proceeding is being appealed, the second distribution proceeding has not started and funds for the first half of that year were just paid in by cable operators; there are cable funds on deposit in the Treasury of the United States which respectively represent 1978, 1979, and part of 1980 in the amount of more than $41,657,000.

The appeal on the 1978 funds may be concluded in 1983. But what if the higher court sends the matter back to the Tribunal and subsequent appeals are taken? As a footnote, Mr. Chairman, there are 1979 and 1980 jukebox funds also on deposit totaling more than $2,165,000. Because of the existing appeals, the possibility of future appeals on each and every distribution proceeding held by the Tribunal, this money will be tied up and effectively kept from the copyright owners for years. The total fund held by the Government could be well over $100 million in the not too distant future.

As I view the legislative history of the act, this was clearly not the intention of Congress. Yet, because, in my opinion, of this clearly unworkable procedure of royalty distribution established by Congress, copyright owners are effectively denied and will continue to be denied their just rewards—the proceeds from the royalty funds timely paid.

In conclusion, Mr. Chairman, and members of the committee, in my opinion, now is the appropriate time for Congress to reanalyze and reevaluate this matter, including the role and function of the Copyright Royalty Tribunal. If this evaluation means the elimination of my job and the present existing or even total function of the Copyright Royalty Tribunal, then so be it. I share and support the opinion of the Senior Commissioner, Thomas Brennan, when he stated on June 12, 1979, before the House of Representative Subcommittee on Communications, "My personal opinion has been that, other than for cable, compulsory license is not necessary or desirable." I will go one step further than Commissioner Brennan. It is my opinion, after 3½ years on the Copyright Royalty Tribunal, that compulsory license is neither necessary nor desirable for cable either.

Mr. Chairman and members of the committee, these conclusions are my own and have been drawn after considerable thought and honest reasoning. The reconsideration of compulsory license, the need for and the function of the Copyright Royalty Tribunal does not rest in my hand nor in the hands of my fellow Commissioners, but its the responsibility of Congress. It is unwise and unnecessary to continue to spend the taxpayers money on a program which is clearly unworkable and impracticable. Further, the unfairness and inequities to the copyright owners must be corrected and the appropriate time is now.

Thank you for the opportunity to express my views, Mr. Chairman, and I will be happy to answer any questions the committee might have.

Mr. KASTENMEIER. In part you speak for yourself and in part you quote Mr. Brennan, but you don't suggest he agrees?

Mr. JAMES. The quote, Mr. Chairman, was a transmittal to the Congress by the Tribunal as a body.

Mr. LEHMAN. That was only with respect to section 118, Compulsory License?

Mr. JAMES. That's true. Public broadcasting.

Mr. KASTENMEIER. It sounds to me like you're calling literally for abolishing the Copyright Royalty Tribunal.

Mr. JAMES. I would say that was a fair analysis of my statement, Mr. Chairman.

Mr. KASTENMEIER. My disagreement with you is not with what you referred to, but what I would refer to as a mess down there, by virtue of your statements. You suggest, the Congress ought do this, the Congress ought to do that, Mr. James. Way back in 1975 and

61

1976 we had concluded definitively that we would not entertain every application for changing compulsory license or whatnot. That's why even Mr. Brennan participated principally in the Senate to create some alternative. Now, whether an administrative law judge or some administrative officer can handle the duties on a part-time basis of those imposed upon the Tribunal, I don't know. Maybe that's an option.

But I can assure you that we would not want to politicize these decisions by bringing them back into the Congress. We neither have the time nor the competence. That is why we created the Tribunal. But it well may be that the Tribunal is inadequate or imperfect or is not the correct instrumentality to perform these functions. I will say that just getting rid of compulsory licenses may sound like the logical way to go, but given the industries that are affected and the equities, that becomes a monumental problem. Most of the suggestions went from $8 to $25 to $50. I don't know what that will do to the jukebox industry. The jukebox noncompliance already of $8 is notorious. But I'm not sure that we can throw them out at the mercy of the various performing rights societies who may or may not deal satisfactorily with it. At least that was the conclusion reached. And with cable, like jukeboxes, they did not have a preexisting liability. And when you literally created a liability for them, it seemed to Congress the reasonable way was to go the way of limited liability through the instrument of the compulsory license.

But that these compulsory licenses should not be set in concrete, given subsequent economic realities and equities, and there ought to be an instrumentality to make adjustments.

Mr. **James**. Mr. Chairman, may I comment on that?

Mr. **Kastenmeier**. Please.

Mr. **James**. Just dealing with the cable rate, as you are aware, the authority of the Tribunal to adjust the cable rate is very narrowly defined. We can only adjust it as it pertains to inflation or deflation or the average change in the basic subscription costs. What we have found in the record of the Tribunal will clearly reflect the cable operators have developed a new system where a lot of times the basic service is free, and they have this process. So when you apply a distant signal or equivalent formula to zero you get zero. I know it's hard to digest what I say verbally. My suggestion is that Congress needs to establish a marketplace value. And on the cable, just the cable rate situation, I'm fully cognizant of the fact that for 12 years this body and the one on the Senate side labored to come up with this act, and I gave some thought and reasoning just to checking it.

But I think that it is not fair and adequate rates are not forthcoming from the current system. The law as currently written does not permit the Tribunal that type of flexibility to broadly examine the whole scope at a reasonable rate, and based upon a record come up with a determination.

So the only place you could go back, in my opinion, is to the Congress because the statute doesn't authorize the Tribunal to proceed.

Mr. **Kastenmeier**. That's one of the questions—whether your statutory authority, the guidelines for it, ought to be altered, liberalized, or whatever, so that in fact you have greater flexibility in dealing with these problems. That is at least one possible solution to the present problem. But if there is not, as you suggest, a need for interference by another Federal agency, meaning your own, there is scarcely a need for interference by the Congress either, which is, I think, monumentally more likely to come up with a detached objective resolution of something that it really doesn't have the time to understand anyway. You're talking about 535 people.

But I do welcome your testimony insofar as you clearly carry an urgency about the present condition of matters as seen from the perspective of the Tribunal. Obviously, the work of this committee certainly is cut out for it in the sense that we will have to deal substantively with the copyright matters in part with what you have said and that is certainly a message you are sending. We would, of course, speak to your colleagues, since you are speaking for yourself in this connection.

Well, let me yield to my colleague, the gentleman from Michigan.

Mr. **SAWYER**. Mr. Chairman, I have to tell you this is the most professional testimony I have heard from anyone connected with the bureaucracy since I have been in Congress and I send you my condolences on your family problems. I can certainly sympathize with those, too.

Mr. **JAMES**. Thank you.

Mr. **SAWYER**. I am, as I said a number of times here, not an experienced copyright or patent lawyer and my service on this subcommittee in the last Congress was kind of my first in-depth exposure to the issues, but I raised the very question in one or more of our hearings as to why a compulsory license is necessary. I never really understood the operation of that or the need for it.

It seems to me that the marketplace would, at some point, arrive at a price where it is attractive for television stations to sell their signals and for cable to negotiate a price and buy them. We don't compel anybody to sell any other product that I'm aware of, except utilities to people, and the self-interest in the marketplace kind of makes that possible. In labor relations we don't compel agreements either. We only go so far as to compel the bargaining in good faith and maybe just such a compulsion to bargain in good faith might be enough in this instance rather than making it a compulsory agreement. This has bothered me ever since I first got exposed to it because I never understood the rationale and I kind of attributed that to my own ignorance. But now I'm somewhat bolstered in my view by listening to somebody who has been working with it, and at least to some extent sharing in the same view.

Mr. **JAMES**. Well, Congressman, thank you for your comments. In my first year as a commissioner I undertook the task to review the entire legislative history of the act and it's just volumes and volumes. But I think, and I sympathize and clearly recognize the problem that Congress was facing when they enacted the act in regard to cable, that it would probably be very burdensome to have every cable system deal with every copyright owner as to the secondary transmission of their work.

And I recognize that this is a tremendous hurdle to overcome. One of the things that we did—and I don't know how familiar this committee is—with our first distribution proceeding. As I indicated in my statement, it is on appeal. At the suggestions of copyright owners, they were put in categories or classes. There are about five classes, and within each class distributions were made by the Tribunal to the classes as a whole. Within each class the claimant made their own arrangements for distribution—which the statute clearly provides, as to how that fund was to be split. I don't know if a combination of that—because that came out of the hearings—is a workable thing for going back to elimination of compulsory license and letting the marketplace value go up, or whatever.

Mr. SAWYER. The problem of multiple places to deal with, is not new in the labor bargaining area either. Many union management groups bargain on a regional basis. The Teamsters, in particular, with the common carriers. They'll have a Central States contract where both sides elect or appoint a committee and they, in effect, bargain for all the operators within that big multistate area. It would seem to me that the multiplicity of units could be classified into groups and compelled to bargain in good faith, like labor and management do it, or in many other ways. It might be more practicable.

On one other issue that's bothering me, I kind of visualize the jukebox problem as even a bigger can of worms and apparently from the enforcement problem, I guess it is. I can see the difference between the copyright owner on a record selling it to private individuals for one price and maybe either to jukeboxes and/or radio stations or TV for another price. I wonder if there couldn't be some system devised whereby for a record to be sold for commercial use at a specific price it would be made in a particular way and/or given a stamp to distinguish it from the records that you or I might buy in the record shop at a totally different price.

Let the record companies put their prices on what they will sell to either jukeboxes and/or radios and avoid all this silly bookkeeping and everything else that goes on, either privately or by the Government. It seems to me there has to be a simpler system where we can back the Government out of this problem and let the people serve their own economic needs on both ends.

Mr. JAMES. Well, the only comment I would like to make on that is with the number of jukeboxes that you have in this country—and everybody is still guessing about the actual number—I think it would almost be impracticable to have. You must have some form. You need to have at least some semblance of a system where moneys are paid because to have the marketplace take hold and have each individual jukebox operator or every jukebox establishment that owns its own jukebox deal with the performing rights societies would be just insurmountable.

Mr. SAWYER. No, that wasn't exactly the point I had in mind. The Government at one time by regulation of the FCC required all television sets made after a certain time to include all the UHF channels, more or less, to provide a market for the then foundering UHF stations, as opposed to the VHF.

Perhaps we could require that all jukeboxes made from a certain time on would have to be geared to handle a certain kind of record configuration, holes, or however you want to do it. The jukebox operator would then have to buy a different kind of a record, let's say, at a significantly higher price, thereby yielding what you might otherwise yield by this kind of royalty.

That just seems to be a simpler way than any I have heard suggested to protect the legitimate interest of the record company by allowing them to differentiate in the price of what they get between selling to a radio station and/or a jukebox as opposed to selling to a private individual for his own living room. This approach would allow the record companies to get their money right up in front without regard to how many times a record is played thereafter.

Mr. **Kastenmeier**. Will the gentleman yield?

Mr. **Sawyer**. Sure.

Mr. **Kastenmeier**. I always thought the gentleman's idea was good. We explored it in the 1960's, as a matter of fact, and some people remember. One of the difficulties is it isn't the record companies that benefit from that particular royalty—it is the performing rights societies. So you're asking the record companies then to collect by having a different label. I know that sounds reasonable on a record and collecting additional moneys and then returning those moneys as royalties over to the performing rights societies. And that seemed to be a problem.

Mr. **Sawyer**. Except it would seem to me that could be done directly in the bargaining between the record company and the performing society group. If they're going to make a recording, that's going to be sold to a jukebox or sold to radios, they could bargain for a different price directly up front on what they're made for. I believe that we've got into an almost insoluble mess. I yield back the balance of my time.

Mr. **Kastenmeier**. The gentleman from California, Mr. Danielson.

Mr. **Danielson**. Thank you, Mr. Chairman.

Thank you, Mr. James. I will adopt the comments of the gentleman from Michigan. This is possibly the most refreshing or interesting or startling or whatever you want to call it, testimony I've heard in a long time. I commend you for an excellent presentation and probably the importance of it is the reason why I am going to be waiting anxiously to obtain my copy, because I want to read it a few times and try to absorb what is in there.

I think you, in my opinion, have lanced a throbbing boil. Ever since we passed the copyright act this question of what would be the proper fee attached to a compulsory license has been presented me time and time and time again by people from all aspects of the industry. I have to confess I have not been satisfied with what we have done. I think we have created and imperfect solution. It was our best effort, but the result wasn't all we had hoped it would be when we passed the copyright law, and I'm not taking any position at this time as to what is the solution, but I'm afraid that we didn't come up with the solution. We may have even compounded the problem.

I'm not sure about that, but I really do want to have a copy of that statement as soon as possible because I can hardly wait to read what I have heard. I think you have touched upon something.

I have exceptional respect for a person in your position because you have been there for 3½ years. You have been working with it, and quite obviously you acquired the wisdom that none of us can acquire by simply treating these things in the abstract. I may not agree with you in the long run, but I really want to pick your brain and find out why this child of ours turned out to be a monster.

I don't know what we have done, but we have done something wrong here and I'd like to take some steps to correct it.

Now, I want to ask only a couple of questions after that prefix. You know, in the market ordinarily if I were buying or selling a piece of real estate or some personal property, the rule of thumb since time immemorial has been that the fair market value is the price that a buyer and a seller will arrive at provided they're both ready, willing and able to make the transaction. We have eliminated that very wholesome feature entirely by having a compulsory license with an arbitrary figure. Maybe we're too high, maybe we're too low. I don't know whether we are.

But, the discipline of what will a buyer, who is ready, willing, and able to, pay to a seller who is ready, willing, and able to sell, that's been eliminated and I think that's really the crux of our problem here. You have come up with others that I haven't even thought about. The delay in distribution, the potentially greater delay, judicial review of actions which you may take or may not take, the deprivation of the fruits of the owners of products for years because of those delays. I hadn't even thought about that. I don't think this committee ever intended that there be any untoward delays. It was assumed that within a reasonable amount of time—and I mean by that a matter of several months, and at the outside a year—the proceeds would be distributed. And here you talk about the proceeds from 1978.

Mr. **James**. That's correct.

Mr. **Danielson**. Not yet distributed and if there's appellate review in the courts, heaven knows when they'll be distributed. We may go to a different monetary standard by that time. [Laughter.]

So, tell me, do you think that's something analogous to something along the line of ASCAP, or BMI, could it be a vehicle through which the copyright holders could receive their compensation and the copyright users pay that compensation?

Mr. **James**. Well, you mean a national organization that is recognized by all copyright owners?

Mr. **Danielson**. Well, you don't have to be quite that exclusive. In the music field and others you've got ASCAP as one, and there's BMI as another.

Mr. **James**. And SESAC. There are three major performing rights societies.

Mr. **Danielson**. So I didn't say it has to be exclusive, but at least something along that pattern.

Mr. **James**. You mean for the rest of the copyright owners?

Mr. **Danielson**. Right. Correct.

Mr. **James**. I think the number of copyright owners is so great that they can never procedurally get together. I think you can group them in categories.

Mr. **Danielson**. All right. Suppose you had one by categories.

Mr. **James**. And in sports, for instance, the hockey, the basketball, the baseball, and the NCAA grouped together to form a distribution proceeding in the broad category, sports. They in turn, when the distribution was made under—we did it in phases—under phase I it was agreed they would handle—once we turned the fund over to them, they would handle the inner operation of distribution.

Mr. **Danielson**. Well, I'll tell you, I don't want to take too much time here because I know we're going to have to call you back for more testimony, and, frankly, until I have studied your statement—and I'm sure there's going to be a response from around the country—I'm really not prepared to ask too many more. But you have almost hinted yes, it might be done by category.

Mr. **James**. Right.

Mr. **Danielson**. I would like to respond to the comment of the gentleman from Michigan which is apropos here. I thought about the special phonograph record some time ago and in my mind, at least, I dispensed with it. It would have to be something like the wonderful one-horse surrey, you know. You will play it 10 times and it disintegrates. The front side, the flip side, the whole, the label, the whole thing just disappears in a smell of vinyl because how otherwise are you going to regulate this thing? It falls apart all at once, not one groove is left. But I doubt that we can do that. American inventors are ingenious. Suppose you had a squiggle in the middle of this record. Tomorrow somebody is going to come out with a cardboard insert that will fit the square hole and accommodate the round peg.

So, I think we have to do it through some other approach. But thank you very much.

Mr. **James**. You're welcome, Congressman.

Mr. **Danielson**. The most interesting testimony I have heard in a long time.

Mr. **Kastenmeier**. The gentleman from Virginia.

Mr. **Butler**. Thank you, Mr. Chairman. You may have lanced a boil. I don't know what you have done for the underlying infection. Just to put this in perspective now, what is your term?

Mr. **James**. My term?

Mr. **Butler**. Yes.

Mr. **James**. My term expires in September 1982.

Mr. **Butler**. And what about the rest of the people?

Mr. **James**. As you recall, Congressman, there were statute terms in the first appointment. All five commissioners were appointed at the same time for 7-year terms. The first appointment, three commissioners have their 7-year terms and two commissioners have 5.

Mr. **Butler**. I'm not sure I understand yet exactly what you're proposing in terms of how the performer or the copyright owner is going to be compensated, as you envision this, if a cable system picks up a signal or a particular program? How is the owner of the program to be compensated if you abolish the compulsory license?

Mr. **James**. Well, are you dealing with compulsory license for cable or all the other sections?

Mr. **Butler**. Let's start with cables.

Mr. **James**. All right, with cables. I think my statement said that I recognize the difficulty of eliminating it for cable. I think Congress needs to set a fair rate based on the market. If that fair market rate is established using the same system then you applied the rate on a system-by-system basis instead of an industrywide basis. Adopt the Consumer Price Index or some other index so that it's automatic adjust. Have it paid continually to the Register of Copyrights for a disbursement procedure that I think has to and can be developed.

Mr. Butler. But isn't that what we envisioned in the Copyright Royalty Tribunal?

Mr. James. No, Congressman. I think when you set restraints on the scope of how we could adjust the rate, there's no way we can adjust the rate and get it to the marketplace value. We can only adjust it on the two bases.

Mr. Butler. I understand that part of your testimony. That's clear to me. What I'm trying to envision is that you are putting Congress in the ratemaking business.

Mr. James. Congress established the first rate.

Mr. Butler. Yes, I know it.

Mr. James. And that wasn't on a marketplace value as I read the legislative history.

Mr. Butler. I know. Congress is the last outfit to determine the market rate. But, as I understand your suggestion, the constraints on your discretion as to adjusting rates are such that you do not feel like you're serving a useful function. Indeed, you're dealing unfairly with one segment of the process. But if you had less constraints on what you could do, wouldn't that solve your complaints here rather than putting it over on Congress to do it?

Mr. James. Well, if you're suggesting that the Tribunal should be retained and that we have authority——

Mr. Butler. I'm not suggesting. I'm searching for your thoughts—without the benefit of the statement.

Mr. James. I would imagine that if we had the same type of latitude that we have in jukeboxes to take testimony, establish a record, and, based upon that record come up with a final determination, it would probably get a better rate. My basic problem is, as an individual, that the marketplace value has just been knocked out of the rates that we just recently adjusted. And that rate was predicated on something that Congress did, and the act does not now permit us to reevaluate Congress' action and say, hey, the rate should be higher, initially, so we're going to kick it up.

Mr. Sawyer. Will the gentleman yield?

Mr. Butler. Certainly.

Mr. Sawyer. As far as reaching market value, why do we have to have it dictated by any Federal agency? The market will reach its own market value.

Mr. James. That's right.

Mr. Sawyer. It's almost contradictory to say we fix the fair market value.

Mr. Butler. I think that's in quotes.

Mr. James. Was that a question you were asking me, Congressman?

Mr. Sawyer. I'm just puzzled why, if we're going to use the fair market value rate anybody has to fix it other than the marketplace.

Mr. **James**. Well, let me——

Mr. **Sawyer**. You can do it far more accurately than any of us can do it.

Mr. **James**. Well, let me reiterate what I said. I am of the opinion that the compulsory license for everything should be eliminated, but if, in the Congress' wisdom, it must be retained for cable, then it should be predicated on a reasonable and fair market value. It is not now done that way.

My first premise and my personal view is that it should be eliminated.

Mr. **Sawyer**. OK.

Mr. **Butler**. Well, Mr. Chairman, I know we're in a hurry, but isn't the FCC placing us in a position where the cable stations have access to pretty much everything that's available, and if we don't have any compulsory license, there would be no compensation for the programing. Will the cable distributors and stations themselves be under any requirement to pay anybody?

Mr. **James**. Well, I don't know if we have time to get into my views on that subject.

Mr. **Kastenmeier**. We have time. But that was the only question I was going to suggest which was logically about getting rid of governmental interference and so forth. All we need to do is go back to the Supreme Court ruling which was that there is no liability for retransmission, and you will have a much simpler situation. They wouldn't need you and they wouldn't need us. We just won't go into the matter. We'll let the *Fortnightly* case and the *Sutton Teleprompter* case stand on their own. And, you know, there's no need for you. See, it was reversing those cases that made your Tribunal necessary to create a limited liability. But, now, we didn't have to create anybody. We could have let the Supreme Court cases stand and nothing would be required of us in terms of market price or anything else.

Mr. **Sawyer**. Mr. Chairman, I was just going to say why can't we just make it mandatory that they have a license to do it and then let them bargain for the licenses.

Mr. **Kastenmeier**. Why should we interfere with requiring a mandatory license? If we're interested in deregulation and getting government off the backs of people, the easiest way to do that is not to have licensing.

Mr. **Sawyer**. Well, we protect the regular copyright holder. We have given them the right to go in and enforce their rights if somebody doesn't pay them for the copyright. Why not just, in effect, give the same protection to a signal or a record and let them go and get what they have to get to do it.

Mr. **Kastenmeier**. The Court has said there was no liability and we have voluntarily determined there was liability. We didn't have to make that.

Mr. **Butler**. The premise when you did that was that the FCC was going to continue with its modest regulation of syndicated exclusivity. Now that they have pulled back from that you want to pull back from this. How is the marketplace going to arrive at any value when all you can do is what you can appropriate?

Mr. **Danielson**. Mr. Chairman.

Mr. **Butler**. I yield back the balance of my time.

Mr. **Kastenmeier**. The gentleman from California.

Mr. **Danielson**. I reiterate the boil has been lanced and it's going to be fun trying to clear up this infection. But, Mr. Chairman, very respectfully I must remind you that it's true, in our law, we did in effect counter the *Fortnightly* and *Teleprompter* cases. But, in countering them, we also prescribed a new formula for setting the price for compulsory license. I presume that we could modify the law if we decided to do so to counter the *Fortnightly* and *Teleprompter* cases, but without setting a compulsory license and leaving that to the marketplace to determine, I know it would take more legislation, and I don't even know if it's good. But really, this has been the underlying agony of all the debate and discussion in the last 4 years, and I think we have to look at it again.

Mr. **Kastenmeier**. Will the gentleman yield?

Mr. **Danielson**. Sure.

Mr. **Kastenmeier**. Of course, an arrangement agreeable to the cable people was a solution they, the proprietors, and we agreed to. If we had not destroyed something like that, talking about marketplace, there would be no liability at all. I mean, the cable people, their interests and their representatives, and, I think, in the Congress, was about adequate at the time to defeat not only anything in that field, but perhaps any revision of the copyright law, and there was an accommodation among the parties. I would say among several parties. So I don't know now that necessarily we will go to market price, however attractive that may sound. It may be as easy to go to no liability, go back to Fortnightly and Teleprompter. So that's part of what we're all caught in.

Mr. **Danielson**. If the gentleman will yield, I'll concede I don't know the answer to that. I think I tried to make it clear, I don't presume to know the answer, but I do know that the gentleman has opened up the subject matter which has been causing the problems that have come to the attention of most of us, and those problems are not going to go away under the present formula. I think we're going to have to find another approach. Maybe just repeal everything and leave us back to *Fortnightly*. I don't know what the answer is going to be.

Mr. **Kastenmeier**. I don't mean to suggest as an answer, but I'm saying it may be as plausible as another answer. I don't say that I endorse going back to *Teleprompter* or *Fortnightly*, but I am suggesting a range of possibilities.

I do want to thank you for your testimony. It has opened up a dialogue which I think will continue for some time. I don't know whether we will find the answer. Hopefully, Mr. James, you and your colleagues can contribute.

[The complete statement of Mr. James follows:]

COMMENTS OF CLARENCE L. JAMES, JR., CHAIRMAN
COPYRIGHT ROYALTY TRIBUNAL
HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON COURTS,
CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE
March 4, 1981

I would like the record to reflect and for the members of this Committee to understand that my comments are not as Chairman of the CRT. The views and opinions I am about to express are my own. However, some of my comments will reflect action or at least agreement by a majority of the members of the Tribunal.

In my opinion, the Tribunal is not required or needed and is clearly unnecessary to determine reasonable terms and rates of royalty payments for non-commercial broadcasting under Section 118 of the Act. Thomas C. Brennan, Senior Commissioner of the Tribunal, prior to his current position, served as Chief Counsel of the Senate Subcommittee which processed the Copyright Revision Act. He has been actively involved in cable regulatory matters and in my opinion is an expert on all copyright issues. Commissioner Brennan was the architect of a report "Use of Certain Copyright Works in Connection with Non-Commercial Broadcasting", which was submitted to this Committee by the Tribunal on January 22, 1980.

Mr. Chairman I would like to insert that report into the record at this time and ask that it be made a part of this proceeding.

The conclusions reached by Commissioner Brennan, writing for the Tribunal, a view which I share and strongly support, reads in part:

> "One the basis of its review of the experience with Section 118, the Tribunal concludes that the compulsory license is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with the traditional functioning of the copyright system

> and the artistic and economic freedom of those creators whose works are subject to its provisions.
>
> The copyright system can advance the constitutional objectives only if the exclusive rights of authors and copyright proprietors are preserved. Reasonable exceptions to these exclusive rights are justified when necessary to promote public policy. The Tribunal believes that those engaged in communications should be particularly sensitive toward the intervention of the Federal Government in the absence of compelling need.
>
> The Register of Copyrights advised the Congress in 1975 that the proposed public broadcasting compulsory license was not "justified or necessary." The Tribunal believes that the experience of the intervening years confirms the correctness of the Register's position. It is therefore the recommendation of the Tribunal that the Congress reconsider the public broadcasting compulsory license at an appropriate time."

In my opinion, I believe the appropriate time is now. In the event Congress in its wisdom decides to maintain the compulsory license under Section 118, I would recommend that it establish a procedure whereby the public broadcasters would pay to the performing rights societies a sum which is based on public broadcasters revenues and calculated as a percentage of the royalty rate or fee which currently exist between commercial broadcasters and the performing rights societies.

The elimination of the compulsory license to permit owners and users the right to establish value in the marketplace or the adoption by Congress of a rate tied to the commercial fee would effectively eliminate continuous interference by the Federal Government and avoid the need for periodic review of royalty rates by the Tribunal.

In my opinion the CRT is not needed, or required to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in Sections 115 and 116.

Under Section 115, history will support that there is possibly an overriding need for a compulsory license for making and distributing phonorecords. However, the continuous and periodic intervention of the Federal Government in adjusting the rate, totally at the taxpayers expense, in my view is undesirable, unwarranted and unnecessary. In my opinion, a system can be created by Congress which would totally eliminate the interference by the Federal Government, and in particular, the CRT.

The Committee is aware that the Tribunal recently concluded 42 days of hearings on the mechanical rate. It is my understanding that during the revision of the copyright bill only 5 days of hearings were devoted to that subject. At our hearing the copyright owners made a proposal and submitted evidence in support of the same, that the mechanical rate could and should be based on a percentage of the suggested retail list price of phonorecords.

Mr. Chairman I would like to insert that proposal in the record at this time and ask that it be made a part of this proceeding.

The proposal that the mechanical rate be based on a percentage of the suggested retail list price of phonorecords may be unique to the United States, however, sufficient evidence was submitted to the Tribunal which clearly established that the percentage system is widely utilized throughout the world as a basis for arriving at royalties. If Congress were to establish a percentage system, it would effectively eliminate the necessity and need for periodic review of royalty rates by any government agency or by Congress. If the price of records goes up or down, the royalty due and payable will also go up or down. Thus by appropriate action of the Congress another function of the CRT can be eliminated.

Under Section 116 of the Act, jukebox, the Tribunal held 8 days of hearings and concluded an adjustment was appropriate. It is my view that the present requirement under Section 116 for obtaining a compulsory license should be maintained. It should, however, be called something else. Congress under the Act set a rate of $8 a box. The Tribunal adjusted that rate to $25 a box effective January 1, 1982 with an increase to $50 a box commencing on January 1, 1984. The Tribunal further established that the rate would be further adjusted on January 1, 1987 based on the change in the cost of living as determined by the Consumer Price Index from February 1, 1981 to August 1, 1986.

It is my opinion that Congress can and should adopt a fair and reasonable rate based on marketplace value with annual adjustment based on the Consumer Price Index or some other index for the jukebox industry. If Congress were to take such action it would eliminate the need for future interference by a federal agency and another function of the CRT.

Because the Tribunal has not held its first jukebox royalty distribution proceeding I believe it would be inappropriate for me to discuss my personal views on that issue at this time. Under the statute the parties agreed to the distribution of the first fund. They have not for the second fund. We therefore will be starting a jukebox distribution hearing in the near future. My opinion, however, is that the fees collected can be annually distributed without the necessity of distribution proceeding by the CRT. Such a system would permit copyright owners the opportunity to receive their payment the same year payment is made.

The Committee is also aware, that the Tribunal just concluded a rate adjustment proceeding for cable. My personal view is that Congress should eliminate the compulsory license so that the marketplace can set the true value of secondary transmission. The compulsory license requires payment to copyright owners for use of the property by others, preventing free negotiation in the marketplace as to value. The issue of true value in the marketplace must be established by Congress.

The legislative history is clear that there is absolutely no economic justifiction for the statutory schedule initially adopted by Congress for the cable industry. The rates for cable were not adopted on the basis of any objective standards.

The review of that rate, by the Tribunal, under the statute was greatly limited by Congress. Congress did not authorize the Tribunal to adjust the rate based on marketplace value. Nor should it. That must, in my opinion, be done by Congress. The Tribunal could only adjust cable rate to reflect monetary inflation or deflation or reflect the average rate charged cable subscribers for basic services.

Mr. Chairman I would like to note here that in all other statutory license under the Act, the Tribunal has full jurisdiction to review and possibly adjust the rate based on the record developed during the Tribunal hearings. This is not so in cable.

Because the copyright owners and cable operators are not free to negotiate, the only fair, logical and equitable approach to establish a fee if the compulsory license must be retained, is on the basis of marketplace value. Again that rate can and should only be established by Congress. If Congress were to establish such a rate, in my opinion, it must be established on a system-by-system basis instead of the current industry-wide practice.

In my view an industry-wide basis is both unfair and inequitable to the copyright owners.

As part of their submission at the conclusion of the cable rate proceeding, the copyright owners submitted a proposal as to how a system-by-system rate could be implemented. Mr. Chairman I would like to insert part of that proposal into the record at this time and ask that it be made a part of this proceeding.

I would like to state here also that the Proposed Findings of Fact and Conclusions of Law filed by the parties in the various Tribunal proceedings might be of help and assistance to this Committee staff. If requested they will be made available.

In the event Congress establishes a reasonable marketplace rate, applied on a system-by-system basis, with annual or semi-annual adjustments, tied to the Consumer Price Index or some other index, it could in all likelihood eliminate the need for further interference by a federal agency and avoid periodic review by the Tribunal. In the event it became necessary to resolve any issues related to the rate, it is my opinion, this can be effectively done at a savings to taxpayers by a part-time administrative law judge, possibly in the Department of Commerce.

The copyright owners have participated in one cable distribution proceeding and are currently preparing for another. I would imagine that if the copyright owners were put to the ultimate test, they could develop a system or formula which the Congress could enact that would eliminate the necessity and need for a distribution proceeding and continuous government involvement. I believe that a system can be developed and enacted by Congress that would provide for the immediate distribution of the funds held in the Treasury to the copyright owners. Payments to the copyright owners should be made at least within the year after they are paid, not 4 or 5 years. In the event distribution problems arise, they also can be effectively handled by a part-time administrative law judge.

At the present time because the Tribunals first distribution proceeding is being appealed, the second distribution proceeding has not started and funds for the first half of last year were just paid in by cable operators; there are cable funds on deposit in the Treasury of the United States which respectively represent 1978, 1979 and part of 1980 in the amount of more than $41,657,000. The appeal on the 1978 funds may be concluded in 1983. But what if a higher court sends the matter back to the Tribunal and subsequent appeals are taken? As a footnote Mr. Chairman, there are 1979 and 1980 jukebox funds also on deposit totalling more than $2,165,000.

Because of the existing appeal and the probability of future appeals on each and every distribution proceeding held by the Tribunal, this money will be tied up and effectively kept from the copyright owners for years. The total funds held by the government could be well over $100 million in the not-to-distant future.

As I view the legislative history of the Act, this was clearly not the intention of Congress. Yet because of, in my opinion, this clearly unworkable procedure of royalty distribution established by Congress copyright owners are effectively denied and will continue to be denied their just rewards -- the proceeds from the royalty funds, timely paid.

In conclusion Mr. Chairman and members of the Committee, in my opinion, now is the appropriate time for Congress to re-analyze and re-evaluate this matter including the role and function of the CRT. If this evaluation means the elimination of my job and the present existing or even total function of the CRT, then so be it.

I share and support the opinion of the Senior Commissioner, Thomas Brennan, when he stated on June 12, 1979 before the House of Representatives

Subcommittee on Communications "my personal opinion has been that, other than for cable, compulsory licensing is not necessary or desirable."

I will go one step further than Commissioner Brennan, it is my opinion, after 3-½ years on the CRT, compulsory license is neither necessary nor desirable for cable, either.

Mr. Chairman and members of the Committee these conclusions are my own and have been drawn after considerable thought and honest reasoning. The reconsideration of compulsory license, the need for and the function of the CRT, does not rest in my hands nor in the hands of my fellow Commissioners, but is the responsibility of Congress. It is unwise and unnecessary to continue to spend taxpayers money on a program which is clearly unworkable and impractical. Further the unfairness and inequities to the copyright owners must be corrected and the appropriate time is now.

Mr. **James**. I stand ready, willing, and able, Mr. Chairman.

Mr. **Kastenmeier**. Thank you very much. The committee stands adjourned.

[Whereupon, at 12:35 p.m. the hearing was adjourned.]

GENERAL ACCOUNTING OFFICE PANEL ON THE COPYRIGHT ROYALTY TRIBUNAL

THURSDAY, JUNE 11, 1981

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier, chairman of the subcommittee, presiding.

Present: Representatives Kastenmeier and Butler.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel; Audrey Marcus, clerk.

Mr. Kastenmeier. The committee will come to order.

This morning we meet on another copyright matter, pursuant to a letter sent by me to the Acting Comptroller General of the United States, March 30, 1981, in which we asked that the General Accounting Office look at the Copyright Royalty Tribunal to assess, among other things, how well the Tribunal performs its assigned functions, to assess the effect of the Copyright Royalty Tribunal's activities on parties related to its operations, and also to explore what alternatives to its current role, organizational structure, may improve the use of that Tribunal. With that in mind, I am pleased to state that the General Accounting Office has indeed completed its work and has released to us, a statement and attached materials relating to its investigation. I am very pleased to greet today, Mr. Wilbur D. Campbell, Deputy Director of the Accounting and Financial Management Division; Mr. Usilaner, Associate Director of the Division; and also Mr. Lemonias, project manager.

If I have not accounted for all your colleagues, Mr. Campbell, perhaps you can do that for me.

The committee is very pleased to have you in public forum make a statement regarding your own conclusions with respect to the request of this committee.

[The letter of Robert W. Kastenmeier follows:]

79

March 30, 1981

Mr. Milton Socolar
Acting Comptroller General
of the United States
441 G Street, N.W.
Room 7510
Washington, D.C. 20548

Dear Mr. Socolar:

The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has jurisdiction over the Copyright Office of the Library of Congress. In recent months numerous statements have been made regarding the effectiveness and efficiency of the Copyright Royalty Tribunal (CRT). The CRT, which consists of five presidentially appointed commissioners, sets royalty fees for certain uses of copyrighted material in cable television, phonograph recordings, and juke boxes. Of particular concern to my subcommittee is the cable television aspect of the CRT's work. The National Association of Broadcasters, for example, alleges that fees set by the CRT for cable television use of broadcaster's copyright serves to subsidize the cable television industry.

Tentatively, in May 1981, the subcommittee will hold hearings on copyright issues including the CRT and will consider strengthening its authority or transferring its rate setting, royalty collection, and royalty fee distribution activities elsewhere in the federal government.

It would be of great help to the subcommittee if the General Accounting Office could examine:

--how well the Copyright Royalty Tribunal is performing its assigned functions,

--the effect of the CRT's activities on the parties related to its operations, and

--what alternatives to CRT's current role and/or organizational structure may improve the use of copyrighted material and the effect such alternatives may have on interested parties.

Since the information I am requesting is needed very soon, a briefing of the subcommittee staff prior to our hearings would be the most effective method of obtaining the results of your review. I may then request GAO to testify at the hearings.

Thank you for your assistance.

Sincerely,

Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:blb

TESTIMONY OF WILBUR D. CAMPBELL, DEPUTY DIRECTOR, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY BRIAN L. USILANER, ASSOCIATE DIRECTOR, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION; U.S. PETER J. LEMONIAS, PROJECT MANAGER, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION; AND RONELL B. RAAUM, GROUP DIRECTOR, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION

Mr. CAMPBELL. Thank you, Mr. Chairman.

The only one of our team you omitted was Mr. Raaum on my far right, who is a group director in Mr. Usilaner's organization.

My written statement is somewhat lengthy because it has a lot of appendices which I will not read, but you may wish to include the entire document in the record.

Mr. KASTENMEIER. The record will, of course, include your statement and the appendixes attached to it in their entirety.

Mr. CAMPBELL. We are pleased to appear before you today to discuss the results of our brief examination of the operation of the Copyright Royalty Tribunal requested in your March 30, 1981 letter.

In order to comply with that request, we had a rather short time frame and, as a result, our review was somewhat narrow in scope and was directed to the specific questions asked.

We are not addressing the broad policy questions of the merit of copyright compulsory licenses or the reasonableness of the compulsory license rates set by the Tribunal.

In the course of our review, we examined the Tribunal's legislative history and its proceedings and procedures. We interviewed the Tribunal Commissioners, met with representatives of 18 organizations affected by the Tribunal's operations, and met with other key individuals in and out of Government knowledgeable about the Tribunal and the compulsory licenses it oversees.

We also examined the structure and authority of six other Federal rate setting and adjudicatory agencies to see how they compared to the Tribunal.

As you know, prior to 1976, there was only one copyright compulsory license; the so-called mechanical license established by the 1909 Copyright Act relating to the use of copyrighted materials used in coin-operated music machines.

The new licenses established in 1976 were for: Retransmissions by cable systems of distant broadcast signals by television stations; the use of musical records in jukeboxes for profit; and the use of music and certain other creations by noncommercial broadcasters.

The Tribunal is composed of five Commissioners appointed by the President with the advice and consent of the Senate for 7-year terms. Two of the original five Commissioners were appointed for 5-year terms so that Commissioner turnover would be staggered.

The Commissioners are compensated at the highest rate of the general schedule pay rates. No selection guidance is provided in the act regarding the qualifications or backgrounds of the Commissioners.

The Commissioners elected their first chairperson for a 1-year term. Each year thereafter, a new chairperson is selected based on seniority.

The Tribunal now consists of four Commissioners and four secretaries. One Commissioner resigned on May 1, 1981. The Tribunal is authorized to appoint employees who may be needed to carry out its responsibilities on a permanent or temporary basis.

No such staff, other than the Commissioners' secretaries, has ever been appointed. Funds for additional staff support were appropriated in fiscal years 1978, 1979, and 1981.

The Tribunal's budget has been small since its inception. The Tribunal was appropriated $471,000 in fiscal year 1980, and $447,000 in fiscal year 1981.

Two aspects of the Tribunal's work are carried out by the Library of Congress. First, the Library of Congress provides administrative support to the Tribunal by handling its payroll, travel vouchers, and other administrative matters. The Tribunal reimburses the Library for this service; the cost in fiscal year 1980 was $15,595.

Second, cable and jukebox royalties are paid directly to the Copyright Office of the Library of Congress where a staff of 21 receives and distributes the royalty payments. This staff reviews each payment calculation for accuracy, deposits the payments with the U.S. Treasury where they accrue interest, and distributes the royalty payments to copyright owners or their representatives in accordance with Tribunal rulings.

As required by the Copyright Act, the cost for this operation, along with the cost of the Tribunal's royalty distribution proceedings, is deducted from the royalty pool. A total of $562,850—including the $27,429 for the Tribunal's cable distribution proceeding—was deducted from the combined 1978 cable and jukebox royalty pool of $16,814,829.

Given this background, I would like now to turn to the operations of the Tribunal.

We concluded the Copyright Royalty Tribunal has generally followed its legislative mandate. It has followed acceptable procedures and has made determinations required to date. Moreover, with certain exceptions, it is now generally recognized by the affected interests as a competent body, although some disagree with its legislated mission and some are appealing its rulings.

The Tribunal is required to conduct its proceedings in accordance with the provisions of the Administrative Procedures Act, the Government in the Sunshine Act, and the Freedom of Information Act. Other Federal regulatory bodies are also required to follow these Acts. The rules of procedure adopted by the Tribunal appear from our review to be in accordance with the Administrative Procedures Act. In a limited review of Tribunal transcripts and decisions, we did not find any clear violations of procedures.

While most interest group representatives we spoke with could point to problems they had with the Tribunal's interpretation of procedures, some qualified this criticism by saying they regularly have similar problems in courtrooms.

The 1976 Copyright Act prescribes for certain proceedings to be held at specified times and for others to be held only when private agreements cannot be reached. The ratesetting proceedings for cable television, phonorecords, jukeboxes, and public broadcasting must be held at specific intervals. The royalty distribution proceedings for cable television and jukeboxes must, after the initial determination, be held annually if private agreements for distribution cannot be reached. All proceedings have been held as required. The first jukebox fee distribution was made privately without a proceeding.

Lacking private agreements for distributing the 1979 fees, the Tribunal began its first proceeding for distribution of jukebox fees on May 22, 1981. Since the cable royalty fee claimants are again unable to reach a private agreement, the Tribunal plans to hold its second cable distribution proceeding this year. The first final cable royalty distribution was announced September 23, 1980.

We found four of the Tribunal's five key decisions have been appealed. It is difficult to assess the results of the Tribunal's work since these decisions are being appealed in the courts.

The Copyright Royalty Tribunal has issued 19 final rules, determinations and orders. Most of these were procedural rulings on the validity of claims to the royalty pool.

The Tribunal has made five key ratesetting and distribution decisions. One was the 1978 cable royalty distribution determination and the other four were adjustments to the compulsory license rates for cable television, jukeboxes, phonorecords, and public broadcasting. Only the public broadcasting rate determination was not appealed.

The appeals of the Tribunal's decisions allege that the Tribunal did not properly distribute royalty funds, made decisions not supported by the record, established fees not authorized by the Copyright Act, and was inconsistent in the admission of evidence to the hearings.

These appeals do not necessarily reflect poorly on the Tribunal since it is in the interest of those affected by the Tribunal's decisions to challenge them, particularly the early ones. Millions of dollars already collected, as well as the potential for millions more in the future, depend on the precedents set now.

The fact that there is no agreed method of determining the value of a creation outside of the marketplace contributes to the likelihood that Tribunal decisions will be appealed.

The Tribunal's operational effectiveness could be improved by insuring that future appointed Commissioners possess experience and expertise and by removing organizational limitations that result from such things as the lack of legal counsel; access to objective, expert opinion; subpena power; and clear criteria on which to base its decisions. Most of these organizational limitations are not imposed on other Federal ratesetting or adjudicatory commissions.

Of the five Presidentially appointed Commissioners, only one had any significant background in copyright issues. Also, only one had any substantive financial or economic background. None had experience in ratesetting or regulatory work.

Most of the interest groups we spoke with mentioned that it took a year or two before the Commissioners—excluding the one with copyright experience—got up to speed with their work. This impression was confirmed in our discussions with the Commissioners themselves who said that the initial year or so involved a difficult learning process.

The Tribunal performs many adjudicatory functions which require legal expertise. Yet it has not had a general counsel to provide the Commissioners with technical legal advice during hearings and while writing opinions. It happened that two of the original Commissioners were attorneys and were thus able to provide legal advice to the Tribunal. Now only one of the remaining Commissioners is an attorney. Although it is not necessary that Commissioners have a legal background, they should have access to independent legal advice.

In reviewing the Tribunal's decisions and hearing transcripts, we noted numerous instances where the Tribunal performed tasks requiring a significant degree of legal interpretation. For example, the Tribunal: reviewed court decisions cited by claimants in order to interpret the first amendment and its application to copyright law; considered contracts entered into between television stations and sports teams in order to determine the validity and extent of royalty distribution agreements; reviewed common law principles relating to competing claimants, and examined the legislative history of the Copyright Act to establish congressional intent.

A panel of laypersons should not be expected to make interpretations of law that can be the subject of a court appeal without access to a general counsel.

A general counsel would provide the Commissioners with technical advice on the admissibility of evidence and other procedural matters and thus insure greater consistency. A general counsel could also aid Commissioners in writing decisions, and represent the Tribunal in initial judicial appeals. Since the Tribunal does not have a general counsel, the Department of Justice assigns attorneys to handle all aspects of the appeals.

Most of the interest groups we interviewed felt the Tribunal would be improved by having a general counsel. Four of the original five Commissioners also support this idea, although when the Tribunal was initially organized they did not believe a general counsel was needed.

An alternative to hiring a general counsel for the Tribunal may be to allow an attorney from the Copyright Office to serve as counsel to the Tribunal in addition to that individual's Copyright Office responsibilities.

Many of the issues raised in the Tribunal's hearings on rate adjustments and royalty distribution are based on economic analysis. For example, the Tribunal must determine reasonable royalty rates for the mechanical license that adequately compensate copyright owners and publishers, but do not impose excessive burdens on the recording industry. The competing interest groups hire leading economists as well as attorneys to develop their arguments and support their views on these subjects. In a number of cases, economic studies and justifications have been submitted to the Tribunal. The Tribunal should have access to objective, expert opinion to review these economic analyses when it considers such a review necessary.

Although the Tribunal has authority to hire outside consultants, it has not had sufficient funding to do this during the past two fiscal years.

Another area of concern is the Tribunal's lack of subpena power. Although the Copyright Royalty Tribunal's decisions have a significant financial impact on the interest groups affected by compulsory licenses, it is dependent on the information provided by those groups in making its decisions.

The Tribunal can be denied access to data it considers necessary and essential because it lacks subpena power. In recent testimony before the Senate Judiciary Committee, one Tribunal commissioner stated, and I quote:

> The commissioners found it most unsatisfactory during 1980 royalty adjustment proceedings to be placed in the position of receiving only the evidence which the parties chose to present.

Subpena power is also important since appeals of Tribunal decisions are based "on the record." In other words, an appeals court only reviews the material the Tribunal had before it and the decision is based on this material. The court does not subpena new evidence in such a review. Subpena power would ensure that both the Tribunal and the appeals court have all the information needed to make a decision. Because of the legal complexities subpena power involves, it should be granted only if a general counsel is appointed or available.

The Tribunal was not given clear legislative criteria for determining royalty distribution and rate setting for each relevant compulsory license. Unlike the criteria commonly used by rate-setting bodies—such as cost plus a rate of return on investment or a guaranteed profit margin—the Tribunal must adjust rates and distribute royalties on the basis of such criteria as:

Reflecting the relative roles of the copyright owner and the copyright user in the product made available to the public;

Maximizing the availability of creative works to the public;

Affording copyright owners a fair return for their creative work, and

Changes in the inflation rate.

It is obvious that these are not clear criteria to work with. Even the seemingly simple criterion of changes in the inflation rate prompted two hearing days devoted to discussing what inflation is and how to measure it.

The current appeals of key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions. Since there is no way to measure the value of a creation outside of the marketplace, it is virtually impossible to develop clear criteria that would be acceptable to copyright owners and users. If the Congress were to try to specify new criteria, the result would likely be new problems and controversies.

While the Copyright Royalty Tribunal is certainly an unusual organization within the Federal Government, it is nevertheless a presidentially appointed commission with the basic objective to resolve disputes and determine rates—an objective that is common among other commissions. Yet the Tribunal has organizational limitiations not shared by others. We compared the Tribunal with six other Federal rate-setting and adjudicatory organizations to see how their structure and authority compares with the Tribunal's. We do not claim that these six are necessarily a representative sample of Federal commissions, but they do include different types of commissions, some with broad and far-ranging responsibilities and others with narrow and very limited responsibilities.

The number of commissioners varied from 3 to 11, with members' terms ranging from 3 to 7 years. In all cases, the chairperson of the commission was designated by the President and serves at the President's pleasure for the full term of the appointment. In only one case does the legislation creating the commission specify criteria for the President's selection of commissioners. Nevertheless, in most cases, the appointed commissioners are experts or are experienced in issues the commissioners deal with. Significantly, each of the commissions has a general counsel, subpena power, and ready access to expert opinon.

The royalty rates set for the four compulsory licenses were designed to compensate copyright owners for certain uses of their creative works and all are set by the Tribunal. Royalties paid under the cable and jukebox compulsory licenses are held by the Government and are distributed according to Tribunal decisions. Except for distribution of 1978 jukebox fees, no distributions were made from the royalty pools controlled by the Tribunal until May of this year. The delay was largely due to the copyright owners' legal challenges of the Tribunal's recommended distribution.

The distribution proceeding for 1978 cable royalty fees was instituted on September 12, 1979. The Tribunal announced its final determination on September 23, 1980, after a long series of hearings. The recommended distribution was immediately appealed by the claimants. Pending judicial review, the royalty fees were held by the U.S. Treasury. In May 1981, the Tribunal's order to distribute one-half of the 1978 cable royalty pool to copyright owners according to its September 1980 determination was effected. The balance of about $8 million will be held until the completion of judicial appeal. The additional royalty payments collected for 1979 and 1980 amount to about $36 million, not including interest.

The Tribunal recently completed a private distribution of the 1978 jukebox royalty pool amounting to about $1.1 million. A distribution hearing commenced on June 2, 1981, to determine distribution of the 1979 pool.

The delay in distributions is largely due to the requirement in the Copyright Act that royalty funds be withheld pending appeals. If, as expressed in section 809 of the act, the Congress intended royalties to be distributed within 30 days of the Tribunal ruling, it could change the law to require partial or full distribution payments regardless of appeals. Naturally, copyright owners would have to realize the possibility that the appeal process could result in a change in their royalty payments. We believe the problems posed by this possibility are outweighed by the desirability of prompt royalty payments.

Alternatively, the Congress could revise the law to make Tribunal decisions final, subject to reversal only by a Senate or House resolution. This was considered before enactment of the 1976 Copyright Act. Appeals to the courts could then be limited to questions of fraud, corruption, or impropriety in the decisionmaking process.

With regard to the utilization of commission officials, each of the Tribunal commissioners is paid at the top of the Federal pay schedule. This is the pay rate for directors and administrators of major Federal agencies and programs. The Tribunal commissioners, however, have a staff limited to their secretaries, and a workload that, by their own estimate, will consume only somewhat more than one-half of their work time.

While the commissioners had a fairly busy and demanding year in 1980, the Tribunal should have only about 21 proceedings in the next 5 years. Unless the Tribunal's legislative charter is changed, there should never be another year as busy as 1980, and most should require much less time.

In conclusion, the Copyright Royalty Tribunal is a relatively new agency with a short track record, and most of its major decisions are now under appeal.

It is thus difficult to draw any final conclusions on its performance. It is clear the Tribunal was given a very difficult task with no technical support and minimal authority with which to work

The Tribunal has done what it was mandated to do. With some exceptions, it is now generally recognized by the affected interests as a competent body, although some disagree with the Tribunal's legislated mission.

Although most of its decisions are being challenged in the courts, this almost always occurs when an independent body makes precedent-setting rules.

The question of whether or not the Copyright Royalty Tribunal is to be retained, and if so, in what organizational structure, is a basic policy question that must be decided by the Congress. If it is to be retained, we believe its organizational limitations should be removed.

With that in mind, we recommend that the Congress amend the Copyright Act of 1976 [Public Law 94-553] and appropriate additional funds to improve the operations of the Copyright Royalty Tribunal. Specifically, we recommend that the Congress: (1) Require full distribution of royalty payments as decided by the Tribunal within 30 days of the decision unless a claimant can satisfy the requirements for obtaining a court injunction; (2) Provide the Tribunal with access to a general counsel; (3) Provide the Tribunal with subpena power; (4) Provide the Tribunal with adequate funding to obtain objective, expert opinion, when needed; and (5) Require that future commissioners be knowledgeable in matters related to copyright.

In examining the last problem area we identified—underutilization of high-level officials—we believe corrective action should be taken, but find the evidence does not clearly support one particular course of action.

Some of the available options include: (1) Reduce the size of the Tribunal from five to three Commissioners. This would reduce the annual costs of the Tribunal, but would not fully address the problem of workload; (2) Restructure the Tribunal with a single, full-time Chairperson and general counsel and a number of part-time Commissioners who would convene for hearings. The Commissioners would be Presidential appointees who would be paid only during hearings. The part-time Commissioners could be distinguished copyright attorneys, law professors, retired experts in copyright-related areas, and other qualified individuals willing to serve several weeks a year for such important and prestigious service. If the workload seems too great for part-time Commissioners, it could be arranged that only some of them would serve with the Chairperson at any given time, thus halving the part-time service; (3) Transfer the Copyright Royalty Tribunal to the Department of Commerce. This alternative has been discussed occasionally and generally calls for placing the Tribunal and the Copyright Office with the Patent and Trademark Office under an Assistant Secretary for Intellectual Property. While this approach could resolve many of the problems we identified in our study, it raises a policy issue that is beyond the scope of our review; namely, whether copyright registration and regulation belongs in the executive branch; (4) Eliminate the Copyright Royalty Tribunal. This is by far the most controversial alternative to the current operation of the Tribunal and could involve either maintaining or eliminating the compulsory licenses. If maintained, rates would then have to be periodically set by the Congress or tied to a self-adjusting index. Government-collected royalties could be distributed to claimants based on private agreements or through court rulings. If compulsory licenses are eliminated, all rates would be set privately and paid privately; and (5) Restructure the Tribunal as a part-time, ad hoc body, with presidentially appointed Commissioners convened by the Register of Copyrights. Petitions to convene the Tribunal for rate adjustments or due to distribution controversies would be made to the Register. The Register's role would be limited to convening the Tribunal when petitioned and providing staff support, including a general counsel, on an as-needed basis.

If the Tribunal is to be maintained, this alternative would have the advantage of resolving many of the problems we identified, while drawing on the existing expertise of the Copyright Office. We do not believe this approach violates the doctrine of separation of powers, or the Supreme Court's holding in *Buckley* v. *Valeo*, since the Register will be limited to convening presidentially appointed Commissioners—a nondiscretionary duty not involving appointments. As in a previous alternative, the Commissioners could be distinguished individuals knowledgeable in copyright-related matters.

This concludes my formal statement, Mr. Chairman, and we will be happy to respond to any questions you may have.

[The statement of Wilbur D. Campbell follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 10:00 A.M. EDT
THURSDAY, June 11, 1981

STATEMENT OF
WILBUR D. CAMPBELL
DEPUTY DIRECTOR, ACCOUNTING AND
FINANCIAL MANAGEMENT DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
HOUSE OF REPRESENTATIVES

ON

THE OPERATION OF THE COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman and members of the subcommittee:

We are pleased to appear before you today to discuss the results of our brief examination of the operation of the Copyright Royalty Tribunal.

In your March 30, 1981, letter, you asked GAO to examine

--how well the Copyright Royalty Tribunal is performing its assigned functions,

--the effect of the Tribunal's activities on the parties related to its operations, and

89

--what alternatives to the Tribunal's current role and/or organizational structure may improve the use of copyrighted material and the effect such alternatives may have on interested parties.

In order to comply with your request, we had to complete our examination in 9 weeks. As a result, our review was narrow in scope and was directed to the specific questions asked. We are not addressing the broad policy questions of the merit of copyright compulsory licenses or the reasonableness of compulsory license rates set by the Tribunal.

In the course of our review, we examined the Tribunal's legislative history and its proceedings and procedures. We interviewed the Tribunal commissioners, met with representatives of 18 organizations affected by the Tribunal's operations, and met with other key individuals in and out of Government knowledgeable about the Tribunal and the compulsory licenses it oversees. We also examined the structure and authority of six other Federal rate setting and adjudicatory agencies to see how they compared to the Tribunal. A more detailed discussion of our objectives, scope, and methodology is attached as appendix I.

Before discussing our findings regarding the operation of the Tribunal, we will first briefly explain the development of compulsory licenses, and then the Tribunal's responsibilities and funding.

The Copyright Royalty Tribunal Was Created To Oversee The Compulsory Licenses Provided By The 1976 Copyright Act

The Copyright Royalty Tribunal was established by the 1976 Copyright Act as an independent agency in the legislative branch to administer and adjust the compulsory licenses set forth in the act. A compulsory license permits the use of copyrighted material under certain circumstances without the permission of the copyright owner, provided a Government-set payment is made to the copyright owner.

Prior to 1976, there was only one copyright compulsory license; the so-called "mechanical license" established by the 1909 Copyright Act relating to the use of copyrighted materials used in coin-operated music machines. The royalty rate was set at two cents per song sold. This two-cent rate was also applied to the sale of phonograph records.

From 1909 to 1976, there were numerous unsuccessful efforts to expand the use of compulsory license to other areas as well as to eliminate the mechanical compulsory license. The 1976 Copyright Act expanded the use of compulsory licenses to three new areas and modified the original compulsory license. The new licenses were for

--retransmissions by cable systems of distant broadcast signals by television stations,

--the use of musical records in jukeboxes for profit, and

--the use of music and certain other creations by noncommercial broadcasters.

The act set fees for each of the three new compulsory licenses and modified the mechanical license by increasing the royalty rate and adding a length-of-song factor.

The Copyright Royalty Tribunal was given six responsibilities with regard to these four compulsory licenses.

1 Adjust the compulsory license rate paid to the Register of Copyrights for retransmission by cable systems of distant, non-network broadcasts by television stations (section 111).

2. Determine the distribution of fees deposited with the Government by cable systems (section 111).

3. Determine the compulsory license rate paid to the Register of Copyrights for performance of nondramatic musical compositions by jukeboxes (section 116).

4. Determine the distribution of fees deposited with the Government by jukebox owners (section 116).

5. Adjust the mechanical compulsory license rate on the sale of nondramatic musical works embodied in phonorecords (section 115). These fees are paid to copyright owners without Government involvement.

6. Determine reasonable terms and rates for public broadcasting entities' use of musical, pictorial, graphic, and sculptural works (section 118). These fees are paid directly to copyright owners without Government involvement.

The Tribunal is composed of five commissioners appointed by the President with the advice and consent of the Senate for 7-year terms. Two of the original five commissioners were appointed for 5-year terms so that commissioner turnover would be staggered.

The commissioners are compensated at the highest rate of the General Schedule pay rates. No selection guidance is provided in the act regarding the qualifications or backgrounds of the commissioners. The commissioners elected their first chairperson for a 1-year term. Each year thereafter a new chairperson is selected based on seniority.

The Tribunal now consists of four commissioners and four secretaries. One commissioner resigned on May 1, 1981. The Tribunal is authorized to appoint employees who may be needed to carry out its responsibilities on a permanent or temporary basis. No such staff, other than the commissioners' secretaries, has ever been appointed. Funds for additional staff support were appropriated in fiscal 1978, 1979, and 1981.

The Tribunal's budget has been small since its inception. The Tribunal was appropriated $471,000 in fiscal 1980, and $447,000 in fiscal 1981. Funds appropriated and expended by the Tribunal since fiscal 1977 are shown in Table 1 on p. 6.

Two aspects of the Tribunal's work are carried out by the Library of Congress. First, the Library of Congress provides administrative support to the Tribunal by handling its payroll, travel vouchers, and other administrative matters. The Tribunal reimburses the Library for this service; the cost in fiscal 1980 was $15,595.

Table 1

Copyright Royalty Tribunal Annual Budget Appropriation

Year	Amount Appropriated	Amount Expended
FY 1977	$276,000	$ 32,351*
FY 1978	726,000	469,775
FY 1979	805,000	485,979
FY 1980	471,000	461,196
FY 1981	447,000	-
FY 1982 (est.)	500,000	-

* for 10 month period

Second, cable and jukebox royalties are paid directly to the Copyright Office of the Library of Congress where a staff of 21 receives and distributes the royalty payments. This staff reviews each payment calculation for accuracy, deposits the payments with the U.S. Treasury where they accrue interest, and distributes the royalty payments to copyright owners or their representatives in accordance with Tribunal rulings. As required by the Copyright Act, the cost for this operation, along with the cost of the Tribunal's Royalty distribution proceedings, is deducted from the royalty pool. A total of $562,850 (including the $27,429 for the Tribunal's cable distribution proceeding) was deducted from the combined 1978 cable and jukebox royalty pool of $16,814,829.

Given this background, I would like now to turn to the operations of the Tribunal.

The Tribunal Has Operated According To Its Legislative Mandate

The Copyright Royalty Tribunal has followed its legislative mandate. It has followed acceptable procedures and has made determinations required to date. Moreover, with certain exceptions it is now generally recognized by the affected interests as a competent body, although some disagree with its legislated mission and some are appealing its rulings.

The Tribunal is required to conduct its proceedings in accordance with the provisions of the Administrative Procedures Act, the Government in the Sunshine Act, and the Freedom of Information Act. Other Federal regulatory bodies are also required to follow these acts. The rules of procedure adopted by the Tribunal (37 C.F.R. 301) appear from our review to be in accordance with the Administrative Procedures Act. In a limited review of Tribunal transcripts and decisions, we did not find any clear violations of procedure.

While most interest group representatives we spoke with could point to problems they had with the Tribunal's interpretation of procedures, some qualified this criticism by saying they regularly have similar problems in court rooms.

Although we did not specifically check for compliance with the Sunshine and Freedom of Information Acts, we did not note any non-complying actions in the proceedings we reviewed.

The Tribunal has held all proceedings required by statute on schedule

The 1976 Copyright Act prescribes for certain proceedings to be held at specified times and for others to be held only when private agreements cannot be reached. The rate setting proceedings for cable television, phonorecords, jukeboxes, and public broadcasting must be held at specific intervals. The royalty distribution proceedings for cable television and jukeboxes must, after the initial determination, be held annually if private agreements for distribution cannot be reached. The frequency of the proceedings is shown in Table 2 on p. 9. All proceedings have been held as required. The first jukebox fee distribution was made privately without a proceeding. Lacking private agreements for distributing the 1979 fees, the Tribunal began its first proceeding for distribution of jukebox fees on May 22, 1981. Since the cable royalty fee claimants are again unable to reach a private agreement, the Tribunal plans to hold its second cable distribution proceeding this year. The first final cable royalty distribution was announced September 23, 1980.

Four Of The Tribunal's Five Key Decisions Have Been Appealed

It is difficult to assess the results of the Tribunal's work since four of its five key decisions are being appealed in the courts.

The Copyright Royalty Tribunal has issued 19 final rules, determinations, and orders. Most of these were procedural rulings on the validity of claims to the royalty pool. The Tribunal has made five key rate and distribution decisions. One was the 1978 cable royalty distribution determination and the other four were adjustments to the compulsory license rates for cable television, jukebokes, phonorecords, and public broadcasting. As indicated in Table 3 on p. 11, four of these decisions are being appealed by the affected interests. Only the public broadcasting rate determination was not appealed.

The appeals of the Tribunal's decisions allege that the Tribunal did not properly distribute royalty funds, made decisions not supported by the record, established fees not authorized by the Copyright Act, and was inconsistent in the admission of evidence to the hearings. The five key decisions, the issues

Table 2

Types and Frequency of Proceedings of The Copyright Royalty Tribunal

Type	Date initial proceedings commenced	Frequency
1. Rate setting		
Cable television (sec. 111)	1/2/80	1980 by statute, every 5th year thereafter by petition
Mechanical (sec. 115)	1/2/80	1980 by statute, 1987 & every 10th year thereafter by petition
Jukebox (sec. 116)	1/2/80	1980 by statute, every 10th year thereafter by petition
Public broadcasting (sec. 118)	12/8/77	1977 & 1982 by statute, every 5th year thereafter by statute
2. Royalty distribution		
Cable television (sec. 111)	9/12/79	Annually if there is a controversy
Jukebox (sec. 116)	5/22/81 1/	Annually if there is a controversy

---

1/Proceeding to distribute 1979 royalty pool. The 1978 jukebox distribution was made privately without a controversy.

involved, the criteria upon which the decisions were based and the resulting appeals appear in appendix III.

These appeals do not necessarily reflect poorly on the Tribunal since it is in the interest of those affected by the Tribunal's decisions to challenge them, particularly the early ones. Millions of dollars already collected as well as the potential for millions more in the future depend on the precedents set now.

The fact that there is no agreed method of determining the value of a creation outside of the marketplace contributes to the likelihood that Tribunal decisions will be appealed.

Removing Organizational Limitations Could Improve The Tribunal's Operational Effectiveness

The Tribunal's operational effectiveness could be improved by ensuring that future appointed commissioners possess experience and expertise and by removing organizational limitations that result from the lack of legal counsel; access to objective, expert opinion; subpoena power; and clear criteria on which to base its decisions. Most of these organizational limitations are not imposed on other Federal rate setting or adjudicatory commissions.

Only one of the five commissioners has a background in copyright related issues

Of the five presidentially appointed commissioners, only one had any significant background in copyright issues. Also, only one had any substantive financial or economic background. None had experience in rate setting or regulatory work.

Most of the interest groups we spoke with mentioned that it took a year or two before the commissioners (excluding the one with

Table 3

Status of Key Final Rules of the Copyright Royalty Tribunal On Royalty Rate Setting and Distribution

Final rule	Date	Status of Decision
1978 setting of the noncommercial broadcasting royalty rate	6/8/78	Final, was not appealed.
1978 cable royalty distribution determination	9/23/80	Under appeal by National Association of Broadcasters, National Public Radio, Major League Baseball, National Basketball Association, National Hockey League, North American Soccer League, Canadian Broadcasting Corporation, and American Society of Composers, Authors, and Publishers, D.C. Circuit Court, Docket No. 80-2273.
1980 adjustment of the royalty rate for cable systems	1/5/81	Under appeal by National Cable Television Association, American Society of Composers, Authors, and Performers, Broadcast Music, Inc., Joint Sports Claimants, and Motion Picture Association of America, D.C. Circuit Court, Docket No. 81-1005.
1980 adjustment of the royalty rate for jukeboxes	1/5/81	Under appeal by the Amusement and Music Operators Association, and American Society of Composers, Authors, and Publishers, Seventh Circuit Court, Docket No. 80-2837
Adjustment of royalty payment payable under compulsory license for making and distributing phonorecords	1/5/81	Under appeal by the Recording Industry Association of America, National Music Publishers Association, American Guild of Authors and Composers, and Nashville Songwriters Association International, D.C. Circuit Court, Docket No. 80-2540

copyright experience) got up to speed with their work. This impression was confirmed in our discussions with the commissioners themselves who said that the initial year or so involved a difficult learning process.

Four of the five commissioners were appointed to the Tribunal from work in national politics, tax law, and public accounting. One had been counsel to the Senate Judiciary Subcommittee that helped draft the 1976 Copyright Act. While the commissioners are now generally regarded as being knowledgeable and capable in their work, we believe the Tribunal could be more effective if future appointed commissioners have some familiarity with copyright issues without being intimately involved with any affected industry.

The Tribunal lacks a general counsel

The Tribunal performs many adjudicatory functions which require legal expertise. Yet it has not had a general counsel to provide the commissioners with technical legal advice during hearings and while writing opinions. It happened that two of the original commissioners were attorneys and were thus able to provide legal advice to the Tribunal. Now only one of four commissioners is an attorney. Although it is not necessary that commissioners have a legal background, they should have access to legal advice.

In reviewing the Tribunal's decisions and hearing transcripts, we noted numerous instances where the Tribunal performed tasks requiring a significant degree of legal interpretation. For example, the Tribunal:

--reviewed court decisions cited by claimants in order to interpret the First Amendment and its application to copyright law,

--considered contracts entered into between television stations and sports teams in order to determine the validity and extent of royalty distribution agreements,

--reviewed common law principles relating to competing claimants, and,

--examined the legislative history of the Copyright Act to establish congressional intent.

Additionally, it has already been noted that the Tribunal was expected to develop its own administrative procedures consistent with the Administrative Procedures Act.

A panel of laypersons should not be expected to make interpretations of law that can be the subject of court appeals without access to a general counsel.

A general counsel would provide the commissioners with technical advice on the admissibility of evidence and other procedural matters and thus ensure greater consistency. A general counsel could also aid commissioners in writing decisions, and represent the Tribunal in initial judicial appeals. Since the Tribunal does not have a general counsel, the Department of Justice assigns attorneys to handle all aspects of the appeals.

Most of the interest groups we interviewed felt the Tribunal would be improved by having a general counsel. Four of the original five commissioners also support this idea, although when the Tribunal was initially organized, they did not believe a general counsel was needed.

We are not aware of any other commission or regulatory body in the Federal Government that does not have access to expert legal advice. The fact that one of the Tribunal's commissioners happens to be familiar with copyright law is not a sound argument against the need for a general counsel to advise and assist all the commissioners.

An alternative to hiring a general counsel for the Tribunal may be to allow an attorney from the Copyright Office to serve as counsel to the Tribunal in addition to that individual's Copyright Office responsibilities.

The Tribunal lacks access to objective, expert opinion

Many of the issues raised in the Tribunal's hearings on rate adjustments and royalty distribution are based on economic analysis. For example, the Tribunal must determine reasonable royalty rates for the mechanical license that adequately compensate copyright owners and publishers, but do not impose excessive burdens on the recording industry. The competing interest groups hire leading economists as well as attorneys to develop their arguments and support their views on these subjects. In a number of cases, economic studies and justifications have been submitted to the Tribunal. The Tribunal should have access to objective, expert opinion to review these economic analyses when it considers such a review necessary.

Although the Tribunal has authority to hire outside consultants, it has not had sufficient funding to do this during the past two fiscal years.

The Tribunal lacks subpoena power

Although the Copyright Royalty Tribunal's decisions have a significant financial impact on the interest groups affected by compulsory licenses, it is dependent on the information provided by those groups in making its decisions. The Tribunal can be denied access to data it considers necessary and essential because it lacks subpoena power. In recent testimony before the Senate Judiciary Committee, one Tribunal commissioner stated:

> "The commissioners found it most unsatisfactory during 1980 royalty adjustment proceedings to be placed in the position of receiving only the evidence which the parties chose to present."

Subpoena power is also important since appeals of Tribunal decisions are based "on the record." In other words, an appeals court only reviews the material the Tribunal had before it and the decision is based on this material. The court does not subpoena new evidence in such a review. Subpoena power would ensure that both the Tribunal and the appeals court have all the information needed to make a decision. Because of the legal complexities subpoena power involves, it should be granted only if a general counsel is appointed.

A number of interest groups we spoke with do not believe subpoena power is needed. They maintain that since Tribunal hearings are adversarial and include cross-examination, the weaknesses in any group's claims can be exposed. However, cross-examination is not a sufficient substitute for subpoena power since it is limited to evidence previously submitted. We have also found that it is highly unusual for a regulatory or rate setting organization such as the Tribunal to lack subpoena power.

The Tribunal lacks clear criteria on which to base its decisions

The Tribunal was not given clear legislative criteria for determining royalty distribution and rate setting for each relevant compulsory license. Unlike the criteria commonly used by rate setting bodies--such as cost plus a rate of return on investment or a guaranteed profit margin--the Tribunal must adjust rates and distribute royalties on the basis of such criteria as

--reflecting the relative roles of the copyright owner and the copyright user in the product made available to the public,

--maximizing the availability of creative works to the public,

--affording copyright owners a fair return for their creative work, and

--changes in the inflation rate.

It is obvious that these are not clear criteria to work with. Even the seemingly simple criterion of changes in the inflation rate prompted two hearing days devoted to discussing what inflation is and how to measure it. Other proceedings presented commissioners with the difficult task of reviewing various economic and equity arguments and then developing a fair ruling that is not disruptive to the affected industries. Unfortunately, no hard data exists to demonstrate the relative roles of copyright owners and users in making products available to the public or for determining a fair rate of return for the use of copyrighted material.

The current appeals of key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions. Since there is no way to measure the value of a creation outside of the marketplace, it is virtually impossible to develop clear criteria that would be acceptable to copyright owners and users. If the Congress were to try to specify new criteria, the result would likely be new problems and controversies.

Most of the Tribunal's organizational limitations are not shared by other Federal commissions

While the Copyright Royalty Tribunal is certainly an unusual organization within the Federal Government, it is nevertheless a presidentially appointed commission with the basic objective to resolve disputes and determine rates--an objective that is common among other commissions. Yet the Tribunal has organizational limitations not shared by others. We compared the Tribunal with six other Federal rate setting and adjudicatory organizations to see how their structure and authority compares with the Tribunal's. We do not claim that these six are necessarily a representative sample of Federal commissions, but they do include different types of commissions, some with broad and far ranging responsibilities and others with narrow and very limited responsibilities.

As shown in Table 4 on p. 18, the number of commissioners varied from 3 to 11, with members' terms ranging from 3 to 7 years. In all cases the chairperson of the commission was designated by the President and serves at the President's pleasure for the full term of the appointment. In only one case does the legislation creating the commission specify criteria for the President's selection of commissioners. Nevertheless, in most cases the appointed commissioners are experts or are experienced in issues the commissions

Table 4

Selected Features of the Copyright Royalty Tribunal and Six Other Federal Commissions

Organization	Commissioners	Commissioners experienced in work of the Commission	Criteria for commissioner selection in law	Term of commissioner	Selection and term of chairperson	Office of general counsel	Commissioners have access to expert staff	Subpoena power
Copyright Royalty Tribunal	5	1 of 5	No	7 years	Rotated annually	No	No	No
Federal Communications Commission	7	3 of 7	No	7 years	Selected by President for full term	Yes	Yes	Yes
Federal Maritime Commission	5	Most have some experience	No	5 years	Selected by President for full term	Yes	Yes	Yes
Federal Trade Commission	5	Most have some experience	No	7 years	Selected by President for full term	Yes	Yes	Yes
Foreign Claims Settlement Commission	3*	2 of 3	No	3 years	Selected by President for full term	Yes	Yes	Yes
Interstate Commerce Commission	11	4 of 5 (6 vacancies)	No	7 years	Selected by President for full term	Yes	Yes	Yes
Occupational Safety and Health Review Commission	3	All are experienced	Yes	6 years	Selected by President for full term	Yes	Yes	Yes

* Only the Chairperson is full time. Other commissioners serve on an as-needed basis.

deal with. Significantly, each of the commissions has a general counsel, subpoena power, and ready access to expert opinion.

Royalty Funds Held By The Government Are Not Distributed Promptly

The royalty rates set for the four compulsory licenses were designed to compensate copyright owners for certain uses of their creative works and all are set by the Tribunal. Royalties paid under the cable and jukebox compulsory licenses are held by the Government and are distributed according to Tribunal decisions. Except for distribution of 1978 jukebox fees, no distributions were made from the royalty pools controlled by the Tribunal until May of this year. The delay was largely due to the copyright owners' legal challenges of the Tribunal's recommended distribution.

The distribution proceeding for 1978 1/ cable royalty fees was instituted on September 12, 1979. The Tribunal announced its final determination on September 23, 1980, after a long series of hearings. The recommended distribution was immediately appealed by the claimants. Pending judicial review, the royalty fees were held by the U. S. Treasury. In May 1981, the Tribunal's order to distribute one-half of the 1978 cable royalty pool to copyright owners according to its September 1980 determination was effected. The balance of about $8 million will be held until the completion of judicial appeal. The additional royalty payments collected for 1979 and 1980 amount to about $36 million, not including interest.

1/Because relevant provisions of the 1976 Act were not effective until January 1, 1978, 1978 was the first year for which compulsory license royalty payments were collected.

The Tribunal recently completed a private distribution of the 1978 jukebox royalty pool amounting to about $1.1 million. A distribution hearing commenced on June 2, 1981, to determine distribution of the 1979 pool.

The delay in distributions is largely due to the requirement in the Copyright Act that royalty funds be withheld pending appeals. If, as expressed in section 809 of the act, the Congress intended royalties to be distributed within 30 days of a Tribunal ruling, it could change the law to require partial or full distribution payments regardless of appeals. Naturally, copyright owners would have to realize the possibility that the appeal process could result in a change in their royalty payments. We believe the problems posed by this possibility are outweighed by the desirability of prompt royalty payments.

Alternatively, the Congress could revise the law to make Tribunal decisions final, subject to reversal only by a Senate or House resolution. This was considered before enactment of the 1976 Copyright Act. Appeals to the courts could then be limited to questions of fraud, corruption, or impropriety in the decision-making process.

The merit of the current appeals can be better determined after the courts have made their final rulings.

Tribunal Commissioners Are Underutilized High Level Officials

Each of the Tribunal commissioners is paid at the top of the Federal pay schedule. This is the pay rate for directors and administrators of major Federal agencies and programs. The Tribunal commissioners, however, have a staff limited to their secretaries,

TABLE 5

Copyright Royalty Tribunal's Actual and Estimated Annual Proceeding Days, Fiscal 1978 - 1985

	1978	1979	1980	1981 estimated	1982 estimated	1983 estimated	1984 estimated	1985 estimated
Section 111, cable								
Rate setting	-	-	1	7	-	-	-	7
Distribution	-	2	23	23	17	12	7	2
Section 115, mechanical								
Rate setting	-	-	41	10	25	5	-	-
Section 116, jukebox								
Rate setting	2	-	8	-	-	-	-	-
Distribution	-	-	-	11	8	6	4	2
Section 118, public broadcasting								
Rate setting	11	-	-	-	15	-	-	-
Multipurpose proceedings	-	1	2	1	1	1	1	1
Other	4	-	-	-	-	-	-	-
Total days	17	3	75	52	66	24	12	12
Number of proceedings	3	2	5	5	5	4	3	4

and a workload that, by their own estimate, will consume only somewhat more than half of their work time.

While the commissioners had a fairly busy and demanding year in 1980, the Tribunal should have only about 21 proceedings in the next 5 years. Unless the Tribunal's legislative charter is changed, there should never be another year as busy as 1980, and most should require much less time.

As shown in Table 5 on p. 21, the commissioners have had 1 year with only 3 days of hearings and another with 75. Based on experience, statutorily required proceedings, and discussions with the commissioners, we project that between now and fiscal 1986 there will be 1 year with 66 hearing days and 2 years with only 12. While the individual proceedings require preparation and decision writing, and there is some additional administrative work, the workload is not full time.

Conclusions, Recommendations, And Matters For The Congress To Consider

The Copyright Royalty Tribunal is a relatively new agency with a short track record, and most of its major decisions are now under appeal. It is thus difficult to draw any final conclusions on its performance. It is clear the Tribunal was given a very difficult task with no technical support and minimal authority with which to work. The Tribunal has done what it was mandated to do. With some exceptions, it is now generally recognized by the affected interests as a competent body, although some disagree with the Tribunal's legislated mission.

Although most of its decisions are being challenged in the courts, this almost always occurs when an independent body makes precedent-setting rules.

The question of whether or not the Copyright Royalty Tribunal is to be maintained, and if so, in what organizational structure, is a basic policy question that must be decided by the Congress. If it is to be retained, we believe its organizational limitations should be removed.

Recommendations To The Congress

We recommend that the Congress amend the Copyright Act of 1976 (P.L. 94-553) and appropriate additional funds to improve the operations of the Copyright Royalty Tribunal. Specifically, we recommend that the Congress:

--Require full distribution of royalty payments as decided by the Tribunal within 30 days of the decision unless a claimant can satisfy the requirements for obtaining a court injunction.

--Provide the Tribunal with access to a general counsel.

--Provide the Tribunal with subpoena power.

--Provide the Tribunal with adequate funding to obtain objective, expert opinion when needed.

--Require that future commissioners be knowledgeable in matters related to copyright.

Matters For The Congress To Consider

In examining the last problem area we identified--underutilization of high level officials--we believe corrective action should be taken but find the evidence does not clearly support one particular course of action. The available options include:

- --Reduce the size of the Tribunal from five to three commissioners. This would reduce the annual costs of the Tribunal but would not fully address the problem of low workload.
- --Restructure the Tribunal with a single, full-time chairperson and general counsel and a number of part-time commissioners who would convene for hearings. The commissioners would be presidential appointees who would be paid only during hearings. The part-time commissioners could be distinguished copyright attorneys, law professors, retired experts in copyright-related areas, and other qualified individuals willing to serve several weeks a year for such important and prestigious service. If the workload seems too great for part-time commissioners, it could be arranged that only some of them would serve with the chairperson at any given time, thus halving the part-time service.
- --Transfer the Copyright Royalty Tribunal to the Department of Commerce. This alternative has been discussed occasionally and generally calls for placing the Tribunal and the Copyright Office with the Patent and Trademark Office under an Assistant Secretary for Intellectual Property. While this approach could resolve many of the problems we identified in our study, it raises a policy issue that is beyond the scope of our review; namely, whether copyright registration and regulation belongs in the executive branch.
- --Eliminate the Copyright Royalty Tribunal. This is by far the most controversial alternative to the current operation of the Tribunal,and could involve either maintaining or

eliminating the compulsory licenses. If maintained, rates would then have to be periodically set by the Congress or tied to a self-adjusting index. Government collected royalties could be distributed to claimants based on private agreements or, if these fail, binding arbitration among the claimants or through court rulings. If compulsory licenses are eliminated, all rates would be set privately and paid privately. Since this approach would likely cause some disruption in the affected industries, a transition period should be provided. There are pros and cons for eliminating each of the compulsory licenses; the views of various parties regarding such actions are discussed in appendix IV.

--Restructure the Tribunal as a part-time, ad hoc body with presidentially appointed commissioners convened by the Register of Copyrights. Petitions to convene the Tribunal for rate adjustments or due to distribution controversies would be made to the Register. The Register's role would be limited to convening the Tribunal when petitioned and providing staff support, including a general counsel, on an as-needed basis.

If the Tribunal is to be maintained, this alternative would have the advantage of resolving many of the problems we identified, while drawing on the existing expertise of the Copyright Office. We do not believe this approach violates the doctrine of separation of powers, or the Supreme Court's holding in Buckley v. Valeo, 424 U.S. (1976), since the Register will be limited to convening presidentially appointed commissioners--a non-discretionary duty not involving appointments. As in a previous alternative, the commissioners could be distinguished individuals knowledgeable in copyright-related matters.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of this review were to examine

- --how well the Copyright Royalty Tribunal performs its assigned functions,
- --the effect of the Tribunal's activities on the parties related to its operations, and
- --what alternatives to the Tribunal's current role and/or organizational structure may improve the use of copyrighted material, and the effect such alternatives may have on interested parties.

In accordance with the subcommittee chairman's request, our review was limited to 9 weeks. As a result, our review was narrow in scope and was directed to the questions asked by the chairman. We did not address the broad policy questions of the merit of compulsory licenses or the reasonableness of the compulsory licenses rates set by the Tribunal.

This review was conducted in Washington, D.C. and New York, New York. We examined the legislative history of the 1976 Copyright Act (P.L. 94-553) and materials related to the establishment and operation of the Copyright Royalty Tribunal. We reviewed selected transcripts of Tribunal hearings and the five key decisions it has made to date. We interviewed the five Tribunal commissioners as well as top officials knowledgeable of the Tribunal and its operations at (1) the Copyright Office, Library of Congress; (2) National Telecommunications and Information Agency, Department of Commerce; and (3) the Cable Television Bureau, Federal Communications Commission. The purpose of these interviews was to obtain information on the Tribunal's effect on copyright law and the affected industries.

We also interviewed key private sector representatives that are directly affected by the Tribunal's rate setting and distribution authority. These representatives were from 18 organizations and were selected because they are affected by at least one of the four compulsory licenses and have appeared at or been represented at Tribunal hearings. (See app. II.) This sample includes all the major parties affected by the Tribunal.

Officials at participating private organizations were assured, when they so requested, that any of their comments that may affect their future dealings with the Tribunal would be kept confidential. Such a pledge of confidentiality was considered necessary since these organizations appear before the Tribunal in rate setting and adjudicatory proceedings.

In order to better place the Copyright Royalty Tribunal in perspective with other Federal rate setting and adjudicatory organizations, we briefly examined six other such organizations. The six were selected to compare different types of collegial bodies of various sizes and organizational structures. These organizations included the Federal Communications Commission, the Federal Maritime Commission, the Federal Trade Commission, the Foreign Claims Settlement Commission, the Interstate Commerce Commission, and the Occupational Safety and Health Review Commission. We interviewed key officials at each of these agencies and reviewed official publications that discussed the organizations' purposes and structures.

PRIVATE ORGANIZATIONS INTERVIEWED BY GAO DURING REVIEW OF COPYRIGHT ROYALTY TRIBUNAL

American Guild of Authors and Composers

American Society of Composers, Authors, and Publishers

Amusement and Music Operators Association

Association of Independent Television Owners

Broadcast Music, Inc.

Christian Broadcasting Network

Community Antenna Television Association

Joint Sports Claimants

Motion Picture Association of America

National Association of Broadcasters

National Cable Television Association

National Collegiate Athletic Association

National Music Publishers Association

National Public Radio

Program Producers and Syndicators

Public Broadcasting Service

Recording Industry Association of America

SESAC, Inc.

KEY RATE SETTING AND DISTRIBUTION DECISIONS BY THE COPYRIGHT ROYALTY TRIBUNAL

The Copyright Royalty Tribunal has made five key royalty rate setting and distribution decisions. These include:

--setting a royalty payment under the compulsory license for public broadcasting,

--the 1978 cable royalty distribution determination,

--the 1980 adjustment of the royalty rate for cable systems,

--the 1980 adjustment of the royalty rate for coin-operated phonorecord players, and

--the adjustment of royalty payment payable under the compulsory license for phonorecords.

All except the public broadcasting decision are now under appeal.

The five key decisions, the issues involved, the criteria upon which the decisions were based, and the resulting appeals are as follows.

Setting The Royalty Payment Under The Compulsory License For Public Broadcasting

The Copyright Royalty Tribunal issued its first final rule setting the royalty payment payable under the public broadcasting compulsory license on June 8, 1978 (43 Fed. Reg. 25068). The criteria used in setting this rate was obtained both from the statute and the legislative history. The criteria included

--consideration of rates for comparable circumstances under voluntary license agreements,

--ensuring that the rate reflects the fair value of the materials used and does not result in copyright owners subsidizing public broadcasting, and

--encouraging the growth of public broadcasting.

Other factors considered by the Tribunal in formulating the schedule of rates included:

--the size and nature of public broadcasting audiences,

--the sources of public broadcasting funding, and

--public broadcasting program practices.

The Tribunal ruled that an annual payment of $1,250,000 per year is a reasonable royalty fee for the performance of ASCAP (American Society of Composers, Authors and Performers) music by the Public Broadcasting System, National Public Radio, and their member stations. Public broadcasting had already reached voluntary agreements with the two other major performing rights societies.

The Tribunal also determined that local and regional programing of public broadcasting entities should be subject to copyright liability in addition to national programing. The Tribunal rejected public broadcasting's argument that only national public broadcasting programs be held liable.

The Tribunal ordered that all public broadcasting rates be adjusted annually according to changes in the Consumer Price Index.

The Tribunal's final ruling was not appealed.

1978 Cable Royalty Distribution Determination

The Copyright Royalty Tribunal issued its final determination for a cable royalty distribution on September 23, 1980 (45 Fed. Reg. 63026). In this determination, the Tribunal specified how much of the cable royalty payments collected in 1978 would go to which claimants. The Tribunal allocated the roughly $15 million royalty pool as follows:

1. Motion Picture Association of America, Christian Broadcasting Network, and other program syndicators--75 percent.
2. Joint Sports Claimants and the National Collegiate Athletics Association--12 percent.
3. Public Broadcasting Service--5.25 percent.
4. Music Performing Rights Societies--4.5 percent.
5. U.S. and Canadian Television Broadcasters--3.25 percent.

The Tribunal based its allocation on the following key criteria:

--The harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems.

--The benefit derived by cable systems from secondary transmission of certain copyrighted works.

--The marketplace value of the works transmitted.

Secondary criteria included the quality of copyrighted material and the amount of time claimants' works were aired.

Actual distribution of these funds was withheld by the Tribunal pending outcome of an appeal made by claimants in each category. According to a later Tribunal order, distribution of 50 percent of the royalty pool was made on May 8, 1981. The remaining funds will be withheld until after the appeals.

The appeals of the distribution are based on claimants assertions that they are entitled to a greater percentage of the royalty pool than that ordered by the Tribunal. Some of the specific arguments before the court include:

--The Tribunal erroneously interpreted the Copyright Act which requires distribution of royalty fees to all copyright owners of works included in distant non-network secondary transmissions.

--The Tribunal's award based on "marketplace value" factors should be set aside since it is inconsistent with the purposes of compulsory licenses.

1980 Adjustment of the Royalty Rate For Cable Systems

The Copyright Royalty Tribunal issued its first final rule on the adjustment of the royalty rate for cable systems on January 5, 1981 (46 Fed.Reg. 892). In this rule, the Tribunal revised the cable royalty rate using legislated criteria that these rates be adjusted to reflect (1) national monetary inflation or deflation or (2) changes in average rates charged cable subscribers for the basic service of providing secondary transmissions. The adjustments were to maintain the real constant dollar level of the royalty fee per subscriber which existed when the Copyright Act was enacted.

This proceeding required the Tribunal to rule on an appropriate measure of inflation as well as determine constant dollar changes in the level of the royalty fee per cable subscriber of basic service. The Tribunal ruled that

--cable royalty rates for rebroadcast of independent distant signals be increased 21 percent and

--the gross recipients limitation for compulsory license liability be increased 33.81 percent rounded to the nearest one hundred dollars.

This decision has been appealed by the National Cable Television Association; the American Society of Composers, Authors, and Performers; Broadcast Music, Inc.; Joint Sports Claimants; and the Motion Picture Association of America.

The key arguments in the appeal are:

--The Tribunal erred by refusing to follow the Copyright Act's directive to simply "maintain the real constant dollar level of the royalty fee per subscriber."

--The Tribunal erred by concluding it had no authority to adopt a rule providing semiannual inflation adjustments in cable rates as a means of effecting the legislative policy to "maintain the real constant dollar level of royalty fee per subscriber."

--The Tribunal failed to provide protection against royalty rate erosion by cable system tiering practices.

1980 Adjustment Of The Royalty Rate For Coin-Operated Phonorecord Players

The Copyright Royalty Tribunal issued its first final rule on royalty rate adjustment for coin-operated phonorecord players (jukeboxes) on January 5, 1981 (46 Fed. Reg. 884).

The Tribunal adjusted this compulsory license rate using the criteria provided by the Copyright Act:

--"Maximize the availability of creative works to the public."

--"Afford the copyright owner a fair return for his creative work."

--"Reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication."

--"Minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

In this ruling, the Tribunal adjusted the legislated compulsory license fee of $8 per jukebox to $25 in 1982, $50 in 1984 and to an amount adjusted by the Consumer Price Index in 1987. The Tribunal rejected arguments that the copyright owners should have to demonstrate a need for a rate increase and that the recommended adjusted royalty rates would have a disruptive impact on the structure of the jukebox industry.

The Amusement and Music Operators Association, representing jukebox operators, and the American Society of Composers, Authors, and Publishers have appealed this decision. Their key arguments are:

--The Tribunal's determination of rates for the jukebox royalty fee was not supported by the record and does not comply with the guidelines of the statute.

--The Tribunal erred in refusing to accept evidence of (1) need on the part of music composers and publishers for an increase in jukebox royalty fees and (2) the way music performing rights societies distribute such royalty fees to their members and affiliates.

--Periodic adjustments of the jukebox royalty fee as determined by the Tribunal are not justified by the evidence of record and are not authorized by the provisions of the Copyright Act.

--The Tribunal's $50 determination should be vacated because, using the Tribunal's marketplace approach, the fee should be no lower than $70.

Adjustments Of Royalty Payment Payable Under The Compulsory License For Phonorecords

The Copyright Royalty Tribunal issued its first final rule adjusting the royalty payment payable under the compulsory license for making and distributing phonorecords on January 5, 1981 (46 Fed. Reg. 891). The criteria used for adjusting the so-called "mechanical license" rate are the same as those for the jukebox compulsory license:

--Maximize availability of creative works to the public.

--Afford the copyright owner a fair return for his creative work.

--Reflect the relative roles of the copyright owners and users in making a product available to the public.

--Minimize any disruptive impact on the industries involved.

The Tribunal adjusted the legislated mechanical rate of 2 3/4 cents per song to 4 cents per song with annual adjustments based on changes in the average suggested retail price of records. The Tribunal rejected arguments that the rate should be set as a percentage of a record's suggested retail price and that the flat rate should be set high to serve as a ceiling leaving bargaining room beneath the ceiling rate for copyright owners and the recording industry.

This decision has been appealed by the Recording Industry Association of America, the National Music Publishers Association, the American Guild of Authors and Composers, and the Nashville Songwriters Association International. The key arguments before the court are:

--The Tribunal's determination of rate for the mechanical royalty fee was arbitrary and capricious, is not supported by the record, and does not comply with the guidelines of the statute.

--The Tribunal violated the Copyright Act by providing for annual reconsideration of the mechanical royalty rate.

--The Tribunal erred in a matter of law and in statutory interpretation when it excluded any consideration of the range within which there would be marketplace bargaining over actual royalty rates.

PROS AND CONS OF ELIMINATING EACH OF THE FOUR COMPULSORY LICENSES

The compulsory licenses included in the 1976 Copyright Act revision have remained the most controversial aspect of that law. Since enactment of the Copyright Act, each of the four licenses--cable television, mechanical, jukebox, and public broadcasting--have been debated extensively. A summary of the arguments for and against each of these compulsory licenses follows.

The cable compulsory license (sec. 111)

There has been increasing discussion in recent months on eliminating the compulsory license for cable television. It was the subject of two recent hearings before this subcommittee as well as one recent hearing before the Senate Judiciary Committee.

Proponents for eliminating the compulsory license for cable argue that circumstances have changed since 1976, when copyright owners and the cable television industry agreed to the current compulsory license arrangement.

Proponents of what is referred to as the "marketplace approach" argue that:

--Cable negotiates for all its programing needs except rebroadcast of local signals (which are exempt from copyright liability) and imported independent signals which are covered by the compulsory license. Continued access to the compulsory license represents an unnecessary and unfair subsidy to the highly profitable cable industry.

--Compulsory license rate setting is extremely complicated and cannot be reduced to an acceptable formula. An issue as complex as this should be handled only in the marketplace.

--Copyright owners should not be compelled to offer their works to cable operators at a Government-set price.

--Copyright owners should not have to appear in hearings to justify payment for their products.

--The use of distant signals by cable systems is of decreasing importance.

--If a reasonable transition period were set for movement to the marketplace, numerous "middlemen" would spring up to provide cable systems with television programing at a reasonable cost.

Opponents of the "marketplace" alternative argue that changes since the 1976 agreement do not merit a revision of the Copyright Act, and compulsory licenses are needed to continue offering viewers diverse programing. They also argue that:

--Compulsory license is less of a subsidy to cable operators than the Federal license broadcasters have to distribute their products over the airwaves.

--Cable operators could not practicably negotiate with every copyright owner whose work was retransmitted by a cable system.

--Cable operators could not compete in the marketplace with major independent broadcasters for the exclusive use of quality programing.

--Since the importation of independent distant signals is of decreasing importance and will be of little importance to large urban cable systems in a few years, the marketplace should be allowed to work its course and largely eliminate the use of cable compulsory licenses without legislative change.

--Restrictions on cable access to independent programing will limit viewer access to diverse programing, particularly in less densely populated areas.

The mechanical compulsory license (sec. 115)

Of the four compulsory licenses the Tribunal oversees, only the mechanical license predates the Tribunal; it was established under the 1909 Copyright Act. The mechanical license has been contested ever since it was established, but was not significantly modified until the 1976 Copyright Act. The original mechanical royalty was established due to the near monopoly one piano roll firm had obtained over copyrighted material.

The continuing debate, which apparently was not affected by the 1976 Copyright Act, revolves around

--whether a need still exists for a mechanical license,

--music publishers' and authors' alleged need for a royalty rate increase,

--the economic impact of a royalty rate increase on the record industry, and

--the impact of a rate increase on the consumer.

Copyright owners have long argued that changes in the music industry, both recording and publishing, have made the mechanical license unnecessary. They claim that the problem the mechanical license was to resolve no longer exists and could not develop again. Authors and composers have argued, as have owners of other copyrights, that they should be given the exclusive right to control the use of their work and should be able to let the market determine the value of their compositions. While the recording industry has expressed concern that this would make the cost of compositions overly expensive, copyright owners will earn very little money from their works if they price them above that rate which the recording companies are willing to pay and thus have a clear incentive to negotiate with the recording industry.

Recognizing that the mechanical license is not likely to be eliminated since it has existed for so long, copyright owners have stressed the need for a higher royalty rate under the compulsory license, or a royalty rate based on a percent of suggested retail price.

While the recording industry recognizes that the monopoly threat of 1909 probably no longer exists, they argue that the compulsory license over the years has enabled the record industry to grow larger and more competitive.

It appears that the mechanical license is now largely accepted by both sides of the music business; the question now centers on the rate and how it should be computed.

The copyright owners argue that the two cents per song royalty rate based on the 1909 act should be adjusted upward to current value on the basis of inflation, or that the 2 3/4 cents per song set by the Congress in 1976 should be adjusted annually on the basis of inflation. They argue that the 2 cents or 2 3/4 cents are the key numbers that should be adjusted according to inflation.

The recording industry maintains that the royalty rate is not the key factor, but rather the percent of revenue from a single record going to copyright owners. In 1909, they estimated that

129

only about 5 percent of revenue went to the copyright owner while today the percent is much higher. The recording industry also points to the increased revenue resulting from the greater sales now made of individual records.

Among the parties affected by the mechanical royalty, there is no strong desire to eliminate the compulsory license. However, there are alternatives to the Tribunal's responsibility for rate adjustment. For example, the Congress could:

--Freeze the current royalty rate and reexamine it again at some future date.

--Set a higher mechanical royalty rate (such as the 8 cents per song recommended by the National Music Publishers Association) to allow negotiation below that ceiling. The ceiling rate could be used if a lower rate cannot be agreed to.

--Determine a reasonable percent of suggested retail (or wholesale) price that should be paid to copyright owners. Once set, this royalty rate would be self-adjusting since part of any increase in record prices would be passed on to copyright owners. This approach was recommended by the former Chairman of the Tribunal earlier this year.

The jukebox compulsory license (sec. 116)

Prior to the 1976 Copyright Act, jukebox operators were not liable for copyright royalty payments from the revenue they obtain by charging to hear copyrighted materials on their jukeboxes. The act established the copyright liability of jukebox operators and created the jukebox compulsory license. The rate for this license in the 1976 act is $8 per jukebox. The Tribunal has adjusted this rate to $25 in 1982, $50 in 1984, and in 1987, to an amount to be determined by the Tribunal in accordance with changes in the Consumer Price Index.

Jukebox operators contend that the compulsory license for which they are liable amounts to double liability since they pay mechanical royalty fees that are built into the price of every record. The mechanical royalty, however, is the responsibility of the record industry. The jukebox liability was established because in jukeboxes, purchased records are used to make a profit.

Having established the liability of jukebox owners, the Congress could eliminate the compulsory license and allow proprietors to negotiate with the performing rights societies for their use of music on jukeboxes as well as by performers and on stereo systems. Restaurant, bar, and club owners must negotiate with performing rights societies for the use of copyrighted music by performers or over sound systems. Jukebox operators, however, fear that this approach will result in increased costs and will make what they consider to be a marginal business enterprise unprofitable.

Another alternative would be for the Congress to establish a rate for jukebox compulsory license and either index it or reexamine it at appropriate times in the future.

Public broadcasting compulsory license (sec. 118)

The 1976 Copyright Act established under section 118 a copyright compulsory license for certain uses of published, nondramatic musical works and published pictorial, graphic, and sculptural works by noncommercial broadcasting. The main issue here is public broadcasting's use of copyrighted music. This compulsory license was recommended to the Congress by representatives of public broadcasting who claimed they required such a license because of unique problems in public broadcasting related to the

--special nature of programing,
--repeated use of programs,
--varied type of producing organizations, and
--limited extent of financial resources.

Without this license, public broadcasting would have to negotiate with copyright owners and performing rights societies for the use of all copyrighted works.

In a 1975 letter to Senator John L. McClellan, the Register of Copyrights stated that the proposed public broadcasting compulsory license was not "justified or necessary." The Copyright Royalty Tribunal, in a January 22, 1980, report, found that thousands of other organizations negotiate without difficulty for private copyright licenses, and even public broadcasting effectively negotiates privately for nondramatic literary works used in its television programing. The Tribunal concluded that the public broadcasting compulsory license "is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with the traditional functioning of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions."

Public broadcasters claim that the compulsory license is still needed and is necessary for their effective operation.

Mr. **Kastenmeier**. Thank you, Mr. Campbell. I would like to take this opportunity to commend your office for the work it has done in terms of the report you have submitted.

Mr. **Campbell**. Thank you, sir.

Mr. **Kastenmeier**. It does raise a number of questions naturally.

Going beyond what you have looked at, should the legislative mandate continue, and if so, should it be continued in the Copyright Office or should it be extinguished entirely?

There would still be problems, of course, or should we maintain the copyright law of the Tribunal? And if so, in its present form, or should it be changed?

Both you and the Copyright Royalty Tribunal have recommended certain changes.

I think you are agreed that if it is to be continued, it ought to have subpena power, and it ought to have a general counsel.

Is it your view that it cannot have a general counsel unless specifically authorized by act of Congress?

Mr. **Campbell**. No, it is our view that they presently have the authority to hire counsel if they so desire. Congress would simply have to provide the necessary funding.

Mr. **Kastenmeier**. On the other hand, we could be explicit about it, too, and mandate general counsel.

Mr. **Lemonias**. A congressional requirement that a general counsel be appointed may help to insure that the necessary funds are provided.

Mr. **Kastenmeier**. I am glad you address the question of whether this is a part-time activity or a full-time activity. It is somewhat seasonal, I guess, in terms of when the various present compulsory licenses are reviewed.

Is your primary recommendation the same as that of the Tribunal, to go from five to three, or do you equally recommend going to a single Commissioner with part-time Commissioners?

Have you arrived at any preferred solution?

Mr. **Campbell**. Well, if you really pinned us to the wall, probably the ad hoc approach, the last recommendation, would solve more of the problems than the others.

To restructure the Tribunal as a part-time ad hoc body with presidentially appointed Commissioners would solve many of the problems that some of the other solutions would not solve.

Mr. **Usilaner**. Going from five to three would not adequately address the underutilization problem.

Mr. **Kastenmeier**. Restructure the Tribunal with a single full-time Chairperson, is that your recommendation?

Mr. **Campbell**. No, I am referring to a completely ad hoc Tribunal.

Mr. **Kastenmeier**. Oh, yes, I see, restructure the Tribunal as a part-time ad hoc body, presidentially appointed Commissioners convened by the Register.

Mr. **Campbell**. Yes.

Mr. **Kastenmeier**. The Register's role would be limited to convening the Tribunal when petitioned.

The Register would provide support staff and everything else these Commissioners needed. They would have no administrative responsibilities?

Mr. **Campbell**. That is correct. Keep it in mind, sir, that all of these options we are presenting here are dependent upon the Congress decision to continue the Tribunal in some form or another.

Mr. **Kastenmeier**. That is what we are exploring.

Assume for the purpose of argument, that there will be compulsory licenses of one form or another, whether it is the same four with the present mandate or somewhat altered. How do we have access to the economists or the others you have talked about? They really have no staff support, except that provided by the Register?

Mr. **Campbell**. Provisions would have to be made for either the Register to acquire the expertise they need, or for the Commissioners to obtain the experts themselves.

Mr. **Lemonias**. That could perhaps be handled at a special meeting of the Commissioners at the suggestion of the Chairman to decide whether or not a consultant or outside expert will be needed. The Tribunal itself could put into motion the request for that person.

Mr. **Campbell**. The expertise could be acquired on an ad hoc basis, as well, for each session. It could be acquired on a case-by-case basis.

Mr. **Kastenmeier**. Do you believe that the Copyright Royalty Tribunal presently has enough access to the Congress in terms of making its needs known, through oversight or the appropriations process or otherwise?

The reason I ask that is, if the Tribunal wants to make a cry for help, do you think it has adequate recourse to Congress?

Mr. **Lemonias**. The Tribunal has had recourse to the Congress and has made requests, but apparently, has not been funded at the level requested, particularly in regard to having access to outside expertise.

Mr. **Kastenmeier**. I think part of their problem has been that in early years, they were given generous funding which they did not require and did not use.

That was subsequently reduced, when, of course, the Appropriations Subcommittee saw it didn't use the money, then the year when they needed the money, it was not available.

Mr. **Campbell**. That is a common problem. One could say it was an error in strategy from the beginning. Maybe the Commissioners didn't really appreciate the full magnitude of their role in the early years.

Mr. **Kastenmeier**. Even if the Tribunal is part-time, with presidentially appointed Commissioners—we will assume it is either that or a reduced number—you would call for clear criteria, professional criteria, in terms of qualification for appointment, would you not?

Mr. **Campbell**. Without some type of background or expertise in this rather complex, complicated area, it is very difficult for the Tribunal to function effectively.

Mr. **Kastenmeier**. It is hard for you to speculate about this, but is it possible that the court decisions, and I know that it is not your responsibility to assess the substance of the decisions, but is it possible that decisions that come down may give us additional information in terms of anything collaterally the courts could say which will give us insights into whether or not the Tribunal is properly performing its decisionmaking function?

Mr. CAMPBELL. Yes, sir, no question but that the final assessment of how well they are doing is going to depend on the results of the court rulings. If, let's say, the courts uphold the decisions made by the Tribunal, it would be a good indication that they have had a pretty good handle on the way they should be going. If, on the other hand, everything they have done to date gets overturned, it sends a very different type of signal.

Mr. KASTENMEIER. I will yield to my colleague from Virginia.

Mr. BUTLER. Thank you. I thank the witness very much, and I do appreciate the work you did in examining this institution.

Focus for a moment on the elimination of the Tribunal. There are four licenses that are affected by it. Let's turn to the public broadcasting compulsory licenses. Is it your recommendation that such license be eliminated?

Mr. CAMPBELL. No, sir, we are not recommending that the licenses be eliminated, nor are we recommending that the Tribunal be eliminated.

We are simply saying, that if the Tribunal is to be retained, its organizational limitations should be removed.

Mr. BUTLER. I understand all of that. Assuming for a moment it is going to be retained, should it retain the compulsory license for public broadcasting, or does that serve any useful purpose?

Mr. CAMPBELL. The question of whether or not the public broadcasting compulsory licensing should be retained, was not part of our review. However, you could retain the public broadcasting compulsory license with or without a Tribunal.

Mr. BUTLER. But if you eliminate all the things it does, you won't have any need for a Tribunal.

Mr. LEMONIAS. We specifically did not address the merits of the compulsory licenses as part of our review.

Mr. KASTENMEIER. In fact, we did not ask them to go into that. We thought that was exclusively a congressional decision, so they did not go into that or the reasonableness of the rulings.

I might add, and I did not add it in my questions, that we have been thinking about the four areas, and that possibly that might be reduced. Actually, it might be expanded.

We are considering a performer's rate, which, if adopted, might make a fifth compulsory license, which this Tribunal would be mandated from time to time to use.

Mr. BUTLER. It would resolve your under-utilization problem.

Mr. LEMONIAS. Yes, elimination of the Tribunal would certainly resolve our concern with the under-utilization of the commissioners time.

Mr. BUTLER. Well, let me rephrase the question.

What I am trying to figure out from your appendix IV where you approach the four licenses is do you find any useful purpose for the continuation of the public broadcasting compulsory license?

Mr. CAMPBELL. As you can see from the appendix in which we present the pros and cons of eliminating each compulsory license, it all depends upon which side you are talking to. If you talk to the users, you get one point of view, and if you talk to the owners, you get another point of view. It would take a special analysis to assess the merits of each of the positions expressed.

Mr. **Butler**. You are really just not going to tell me what you think about that?

All right, let's turn to something else.

I think I understand your recommendation on limiting appeals.

You mentioned the problem the Tribunal has in not being able to distribute money because decisions have been appealed to the court. Then you recommend limiting appeals to questions of fraud, corruption or impropriety in the decisionmaking process, which is very narrow limitation of those.

Do the other or similar agencies that you have looked at have the same restrictions, or is there a precedent for what you suggest here?

Mr. **Lemonias**. That approach was under consideration in the Senate's proposed copyright bill in 1976.

Mr. **Butler**. This proposal was under consideration in 1976.

Mr. **Lemonias**. Yes, but it was not adopted. I do not know whether there is any other precedent for that. Another alternative considered in 1976 to require distribution in 30 days unless either House of Congress overturns the decision. It currently works that distribution is stopped, automatically if there is an appeal distribution.

Mr. **Usilaner**. It would be more difficult to stop a royalty distribution under our proposal.

Mr. **Butler**. It certainly would.

What I am really searching for is precedent for this suggestion.

Mr. **Lemonias**. I am not sure if there is.

Mr. **Usilaner**. We will examine that question and submit the information for the record.

Mr. **Butler**. While you are at it I would like to ask the same question about the subpena power, which you compared with the subpena power that other agencies have. Are there limitations in their subpena powers, or how broad is it?

Mr. **Lemonias**. I believe that generally rate-setting and adjudicatory agencies are simply granted subpena power. The limitations of this authority is decided in the courts. We will also look into this further and provide some additional information for the record.

[The following information was provided for the record:]

Our suggestion to limit judicial review of "Tribunal decisions is intended to promote more timely distribution of copyright royalty funds. The main precedent for this was the original Senate-passed version of the 1976 Copyright Revision Act. There the senate provided for judicial review of Tribunal decisions only in instances of fraud, corruption, or impropriety in the decisionmaking process. (See Senate Report No. 94-473 37 (1975).) The Senate Committee on the Judiciary report on the bill explained:

"It is the review (sic) of the committee that the Copyright Royalty Tribunal affords the most practical and equitable forum for final determinations concerning the distribution of rouyalty fees among the various claimants. The Committee believes that no useful purpose would be served by providing for a general review of such determinations by the Federal courts, section 809 is modeled on the Federal Arbitration Act " (p. 158).

The reference to the federal Arbitration Act in the Senate Report reflects the Committee's intention that the Tribunal's decisions would only be reviewable under limited circumstances such as fraud, corruption or impropriety in the decisionmaking process.

In addition to the Senate-approved language, we examined the laws governing the six other federal agencies referred to in our testimony to see whether they provided a precedent for the limited scope of judicial review were recommended. As in the case of the Tribunal, whose decisions are subject to the judicial review procedures found in the Administrative Procedures Act (5 U.S.C. 701-706), the administrative findings of five of the six agencies will be upheld if the reviewing court determines they are supported by substantial evidence in light of the whole record. The Foreign Claims Settlement Commission is an exception in that judicial review is expressly precluded.

In at least two cases (Interstate Commerce Commission and Federal Maritime Commission), the agency's orders are effective despite appeals or applications for rehearing. The burden is on the appellant to obtain an injunction. This is similar to our proposal for the Tribunal.

Regarding the second question on precedents for our recommended statutory provisions of subpoena power, all of the six agencies examined in our evaluation have such authority. There are no significant restrictions or qualifications on that power found in the statutes, although the courts will examine the reasonableness and relevance of requested information.

Mr. BUTLER. Those are the questions I have about the mechanical problems of the Copyright Royalty Tribunal.

Is there another underutilized ratemaking facility in the Federal Government that just might take over this responsibility?

Mr. LEMONIAS. Well, it seems that the Tribunal performs a rather unique function. I don't know of any other organization that would be an appropriate setting for that type of function.

Mr. KASTENMEIER. If the gentleman will yield? Did you not suggest the possibility of going to the Assistant Secretary for Intellectual Property in the Department of Commerce?

Mr. LEMONIAS. Right, but as we point out in that alternative, that alternative raises the issue of whether or not the Copyright Office should also be transferred to the Department of Commerce. Currently, there is no place in the Department of Commerce that would be an appropriate setting for assigning the Tribunals functions. Moving part of the copyright function to Commerce raises the broad policy issue of where the whole copyright function belongs.

Mr. KASTENMEIER. Why would the whole Copyright Office have to go over there?

The Copyright Office is something else. The Copyright Royalty Tribunal could be moved?

Mr. LEMONIAS. The Tribunal could be moved to Commerce without also transferring the Copyright Office.

Mr. KASTENMEIER. The Copyright Office is something else.

Mr. BUTLER. What about the Court of Claims?

Mr. CAMPBELL. As a possibility of merging the two?

Mr. BUTLER. As a possibility of assuming these functions, whether we merge them or not or run them off, one at a time.

Mr. CAMPBELL. We hadn't really considered the possibility of another underutilized entity assuming this role. We are really not in a position to say whether that is possible or not.

Mr. LEMONIAS. The alternatives we have presented are suggested alternatives. We do not feel that this exhausts all the possible alternatives. Our main concerns are with eliminating the organizational limitations and addressing the question of underutilization at the Tribunal. If the Court of Claims is an acceptable alternative, and if moving the Tribunal would resolve our concerns, then we would feel comfortable with that.

Mr. BUTLER. I have real reservations in my own mind about this amount of money, part time.

Also, I want to know why we are using the copyright law as a forum to referee in the marketplace at all. I have reservations about the necessity for the Tribunal at all, but if we are going to have it, I just don't think it ought to be part time. That is my most immediate reaction.

Mr. **Usilaner**. Another alternative that is a little closer to what you are saying is a full-time chairperson with the remaining members of the commission serving part time. At least you would then have a full-time chairperson.

Mr. **Butler**. I understand that, and here again, though, to put a person in this responsibility who has other calls on his time and his loyalty, and his interests are in doubt. As a policy matter, when you are adjudicating hundreds of millions of dollars, you ought to be able to afford a full-time man.

Maybe he should just do pushups or something, but it ought not to be part time.

Mr. **Usilaner**. A related matter to that is the background and the experience of the commissioners. If the commissioners have to spend most of their time getting up on the learning curve, that is a different matter than if you identify experienced people that would be more able to serve on a part-time basis.

Mr. **Butler**. I wonder about what the criteria that you talk about is: A copyright lawyer with copyright experience? Maybe what you need is an economist, and the economic background, is in my judgment, more significant than the copyright background, and yet, where are you going to find an economist that knows the difference between the value of one page of music and another?

I am not impressed by the argument you need expertise, because it is like shooting crap. It is guesswork any way you do it.

I just think that if we are going to continue this operation, they ought to be full time. If they feel bad about being underutilized then they can read some books on copyright and make them feel better.

I don't want to go into the part-time business.

Mr. **Kastenmeier**. Well, I sympathize with the gentleman from Virginia's point of view.

We already had difficulty distinguishing this for the purposes of *Buckley* v. *Valeo* for the legislative branch by dividing it from Copyright Office.

If we made these people part-time, subject to the call of the Register, with staff and facilities entirely supplied by the Register, it would seem to me we become uncomfortably close to making this function or this office a subsidiary, practically speaking, of the Register. I think the Presidential appointment is fictional in terms of executive authority to be exercised over the discharge of this function. I say that because our experience with then President Carter, was that he was very reluctant at all to appoint anyone and felt very remote from the Tribunal and its function. To make it even more remote from Presidential interest would, in that sense, I think, be destructive of, not only *Buckley* v. *Valeo*, but having any appreciable, independent review, for our purposes, the matters assigned to it.

In any event, you have given us options, and your testimony and the material you submitted to us has been very useful indeed. You have indicated who you interviewed.

Let me ask you only one other question, and it goes to the professional nature of people who, full time or part time, might hereinafter serve as commissioners.

What sort of guidelines, statutory or otherwise, do you suggest?

What would another agency have which would suggest the limits or the requirements of a professional person to be commissioner?

Just a sort of paraphrasing would be adequate.

Mr. **LEMONIAS.** Something along the lines of broad experience or experience in the areas related to the functions of the Tribunal. In the one case that we found where there was legislated experience criteria, the criteria was similarly broad and general. We have recommended that future commissioners be knowledgeable in copyright-related matters. Our recommended language is consistent with that endorsed in the Senate Committee on Government Operations Study of Regulations [95th Congress, 1st session, vol. 1, 34 (1977)].

Mr. **KASTENMEIER.** As with so many areas, of course, it is very common for a person with experience, familiar with matters, to take one position or another, proprietor or user. That is very typical, and we might get into difficulty.

We have to select people who are either disposed to support the proprietors or owners of copyright materials or virtually users, and I don't know whether it would be easy for the President or anyone else to avoid loading the commission, part-time or full-time, one or three or five persons, when we require approval and approval bias perhaps.

Mr. **CAMPBELL.** One possible alternative could be a mix of background on the commission. It would also address the problems that Mr. Butler raised, someone with an economic background, someone with a background in copyright and someone with the legal background, so you avoid that bias that you were referring to and get a good mix and some expertise in different areas. It is a possibility, a suggestion.

Mr. **BUTLER.** Wouldn't it be a nice spot for an ex-Congressman?

Mr. **KASTENMEIER.** In any event, we are deeply grateful to you for exploring these possibilities with us. This is a problem, and the committee will have to deal with it.

I am sorry more of our colleagues aren't with us today, because we will have to make a decision in the near future, notwithstanding changes that make a place in substantive law with respect to their mandated functions.

Thank you very much for your statement, Mr. Campbell. We appreciate you and your colleagues for being with us this morning.

The committee stands adjourned.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

APPENDIXES

A. Report of the Copyright Royalty Tribunal on "Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting" as Required by 37 CFR 304.14

B. Annual Report of the Copyright Royalty Tribunal for the Fiscal Year Ending September 30, 1980

C. Copyright Owners Proposal for a System-By-System Rate for cable

D. Letter from Robert D. O'Brien, President, USTA, to Honorable Robert W. Kastenmeier

APPENDIX A

REPORT OF THE COPYRIGHT ROYALTY TRIBUNAL ON "USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING" AS REQUIRED BY 37 CFR 304.14

INTRODUCTION

17 USC 118 establishes a copyright compulsory licence for certain uses of published nondramatic musical works and published pictorial, graphic, and sculptural works by noncommercial broadcasting. The section defines the activities which may be engaged in by public broadcasting entities, and directs the Copyright Royalty Tribunal (Tribunal) at specified periods to establish rates and terms for such uses. The section also requires the Tribunal to establish requirements by which copyright owners may receive notice of the use of their works, and under which records of such use shall be kept by public broadcasting entities. Section 118 and other relevant provisions of Title 17 became effective October 19, 1976. In accordance with the provisions of Section 118, the Tribunal published in the Federal Register of June 8, 1978 (37 CFR Part 304) its schedule of rates and terms.

The inclusion in the legislation for the general revision of the copyright law of a compulsory license for certain uses of copyrighted works by noncommercial broadcasting was recommended to the Congress by the representatives of public broadcasting. The justification for such a compulsory license was concisely stated in 1975 by a spokesman for the Public Broadcasting Service in testimony before the Subcommittee of the House of Representatives considering the copyright revision legislation.[1] This representative stated that the license "is simply and explicitly designed to establish in the new copyright law a workable method of determining and paying fair compensation without prohibitive delays and with reasonable administration, to the extent that satisfactory arrangements cannot otherwise be negotiated between the various copyright agencies and public broadcasting organizations." It was stated that a special need for copyright clearance assistance in public broadcasting is due to "several inherent characteristics not encountered in commercial television, relating to (i) special nature of programming, (ii) repeated use of programs, (iii) varied type of producing organizations, and (iv) limited extent of financial resources."

The House Committee on the Judiciary at page 117 of House Report 94-1476 in discussing the public broadcasting compulsory license, said that the Committee is "aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of the programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas." The House report also stated that the

---

[1] Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of House of Representatives Committee on the Judiciary, 94th Congress, on H.R. 2223, pp. 865-66 (1975).

"Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting."

Section 118(e)(2) directs the Register of Copyrights to submit a report to the Congress on January 3, 1980 concerning the execution and implementation of voluntary licensing arrangements with respect to the use of nondramatic literary works by public broadcasting stations. The Register is directed to inform the Congress of any problems that may have arisen concerning the use of such works by public broadcasting and to make such legislative or other recommendations as may be warranted.

The Tribunal, in appearing before Committees of the Congress in connection with legislative oversight and other legislative and appropriation matters, has been requested to make recommendations to the Congress in the areas of its statutory responsibilities. To discharge this task in a more systematic manner the Tribunal, in adopting its rules and regulations concerning the use of copyrighted works by public broadcasting, provided in Section 304.14 that:

On January 3, 1989, the CRT, after conducting such proceedings as it may deem appropriate, shall transmit a report to the United States Congress making such recommendations concerning 17 USC 118 that it finds to be in the public interest.

The Tribunal, in its rule, provided for the transmission to the Congress of its public broadcasting report on January 3, 1980 rather than by including its views and recommendations in the Annual Report required by 17 USC 808, to complement the report of the Register in a copyright area where the Tribunal has the principal statutory responsibility.

On November 23, 1979, the Public Broadcasting Service (PBS) and National Public Radio (NPR) petitioned the Tribunal to postpone its public broadcasting report. A major argument advanced in the petition was that the transmission of a report to the Congress "is premature".

Although there was some support among the members of the Tribunal for certain of the arguments advanced in the petition, the petition was denied. In rejecting the request for delay the Tribunal observed that "parties other than PBS and NPR have asked, with respect to the report to Congress under section 304.14, to express concerns on the basis of experience under the Statute." The Tribunal in this connection notes the comments filed by PBS on October 31, 1979 before the Copyright Office of the Library of Congress in the proceeding concerning the Report by the Register of Copyrights on Voluntary Licenses for the Use of Nondramatic Literary Works by Noncommercial Broadcasters. This proceeding of the Copyright Office was principally occupied with consideration of a voluntary arrangement for the use of nondramatic literary works by noncommercial broadcasting that was recorded in the Copyright Office on August 28, 1979. The representatives of PBS, in their comments before the Copyright Office, stated that it would be appropriate to review and evaluate the situation "after a year of such experience." [2]

In order to permit a longer period for reply comments, the Tribunal agreed to postpone its report until January 22, 1980.

In preparing this report the Tribunal solicited written statements of the views of interested persons. Comments and/or reply comments were received from: PBS, NPR, the Italian Book Corporation, Graphic Artists Guild, Broadcast Music Inc. (BMI), American Society of Composers, Authors, and Publishers (ASCAP), Visual Artists & Galleries Association, SESAC, Robert R. Nathan Associates, Inc., and the American Society of Magazine Photographers, Inc.

PERFORMANCE OF NONDRAMATIC MUSICAL WORKS BY PUBLIC BROADCASTING

During the consideration in the Congress of the proposed public broadcasting compulsory license, the Congress emphasized the value of voluntary agreements in lieu of recourse to the provisions of a statutory license. In implementation of that policy, Section 118(b)(2) provides that voluntary license agreements negotiated at any time between copyright owners and public broadcasting entities shall supersede the rates and terms established by the Tribunal.

Prior to the commencement of the Tribunal's proceedings, PBS and NPR reached voluntary agreements with BMI and SESAC, performing rights societies. No agreement was reached by ASCAP and PBS/NPR. With regard to public broadcasting entities not affiliated with PBS/NPR, the picture was mixed as between the existence and absence of voluntary agreements. There had been no systematic effort to reach agreement with unaffiliated public broadcasting entities.

---

[2] In the Matter of Report by the Register of Copyrights on Voluntary Licenses for the Use of Nondramatic Literary Works by Noncommercial Broadcasters, Statement of Public Broadcasting Service, Oct. 31, 1979, p. 11.

The performance of nondramatic musical works by public broadcasting presents two general copyright issues—clearance procedures, and the financial and administrative resources of public broadcasting.

Licenses granted by the several musical performing rights societies cover performing rights in all works licensed by the societies. The record of the Tribunal reflects that ASCAP and BMI are precluded, under the terms of antitrust consent decrees, from refusing to license any user. The record of the Tribunal proceedings does not reflect that SESAC or the Italian Book Corporation, a specialized performing rights society whose works may be used by public broadcasting, has refused to license any user.

The performing rights societies, in their submissions to the Tribunal, maintain that there are no clearance problems or special programming needs of public broadcasting that require a compulsory license of musical works. Public broadcasting responds by citing the legislative desire to assure their "unhindered access" to musical works, and the possible problems of "small noncommercial stations being dragged into an arbitration at one point or the Federal Court in New York City at another point, all at a tremendous waste of time, effort, and money."

On the basis of its experience with Section 118, the Tribunal cannot advise the Congress that these concerns of public broadcasting are well founded. The official record, including both congressional and Tribunal proceedings, suggest that the programming needs of public broadcasting for performing rights in musical works can be fully met by blanket licensing arrangements with the performing rights societies. The Tribunal, in its public broadcasting proceeding, determined "that a blanket license is the most suitable method for licensing public broadcasting to perform musical works." [3]

The argument by public broadcasting that their clearance needs cannot be met within the limitations of their administrative and financial resources without a statutory license cannot be sustained on the evidence since the passage of Section 118. Thousands of enterprises, many of which are not represented by any national association in copyright licensing matters, have with little difficulty or burden, reached blanket licensing agreements with musical performing rights societies.

It has been suggested that even if PBS and NPR may be able to reasonably meet their musical programming needs through the traditional operation of the copyright system and the safeguards provided by the consent decrees, independent noncommercial broadcasting stations still require the protection deemed to be afforded by Section 118. The proceedings before the Tribunal do not supply support for this statement. No radio stations other than those affiliated with NPR, or licensed to educational institutions, participated in the Tribunal's proceedings. Since the Tribunal was bound by the rigid procedural requirements of Section 118 and the Administrative Procedure Act, it was unable to adopt a schedule that was fine tuned to the varied circumstances of public broadcasting stations not affiliated with NPR. Subsequent to the publication of the Tribunal's rates and terms, certain independent noncommercial radio stations discussed their particular needs informally with the Tribunal. The only recourse available to these stations, whose needs were not fully explored because of the expense and burden of participating in a Washington-based rule proceeding, was to explore the feasibility of individual voluntary licensing agreements with the several performing rights societies.

The Tribunal finds that there is no necessity for a compulsory license for the performance by public broadcasting of nondramatic musical works and that the existing statutory structure involves expenses and other burdens that can be obviated by reliance on the customary functioning of the copyright system without interfering with the programming activities of public broadcasting stations. The Tribunal has not discovered any "special programming," "repeated use," or "varied type of producing organizations" clearance problems that require special procedures for the licensing of nondramatic musical works. If the programming needs of public broadcasting for the use of nondramatic literary works are being reasonably met by voluntary clearance arrangements, despite the large number of individual copyright owners, the Tribunal finds it difficult to understand why a compulsory license is necessary for performing rights in musical works.

PUBLIC BROADCASTING RECORDING RIGHTS

Section 118 and the public broadcasting rates and terms adopted by the Tribunal apply to the recording of nondramatic performances and displays of musical works on and for the radio and television programs of public broadcasting entities.

At the commencement of the Tribunal's proceedings, the Tribunal was informed of a voluntary agreement reached by PBS/NPR with the Harry Fox Agency, a licensing agency for recording rights of a number of music publisher copyright owners. However, a number of music publishers, at the time of the Tribunal's proceedings, had not entered into the Harry Fox/PBS/NPR agreement. In addition, the voluntary agreement reached by PBS/NPR and SESAC covered recording as well as performing rights.

---

[3] Federal Register, Vol. 43, No. 111, p. 25069 (June 8, 1978).

The Tribunal proceedings reflect that the terms of the recording rights voluntary agreements include certain provisions which the Tribunal has concluded could not be incorporated in the Tribunal's schedule of rates and terms because of lack of jurisdiction. These provisions include arrangements whereby copyright payments are made only on the basis of nationally distributed or produced programs and authorize certain limited rights outside the United States. To the extent that these provisions are beneficial to public broadcasting entities, they will presumably seek voluntary agreements which incorporate them.

While the standard agreement reached between PBS/NPR and the Harry Fox Agency does not apply to all music publishers, the Tribunal has no basis for finding that necessary, and customary recording rights cannot be obtained from such publishers without administrative or financial burdens. Through long established relationships, a mechanism exists whereby music publisher copyright owners can be readily located and recording licenses secured throught the Harry Fox Agency.

USE OF PUBLISHED PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS BY NONCOMMERCIAL BROADCASTING

The situation concerning the use of published pictorial, graphic, and sculptural works by public broadcasting must be clearly distinguished from performing and recording rights for the use of musical works. No central clearance mechanism for the use of such visual works existed at the time of the congressional deliberations on Section 118, nor has any such mechanism developed in the intervening period. Moreover, for reasons discussed hereafter, it is reasonably clear that it cannot be anticipated that any such mechanism, will be established in the foreseeable future.

PBS, in urging Congress to adopt a compulsory license, said with regard to visual works that "Photographs and pictures are of prime importance in public television production, local perhaps even more than national, and under H.R. 2223 may well become virtually impossible to clear because of the tremendous difficulties in ascertaining, reaching and obtaining permission from the television rights holders in all but a few exceptional cases." [4]

The frequency of use under the compulsory license of visual works by PBS is an important issue in the examination of Section 118. This subject has been analyzed in comments submitted to the Tribunal. While the comments of the representatives of the creators or copyright owners of visual works and those of PBS differ widely as to the conclusions to be drawn, there is general agreement as to the underlying data. According to the analysis of the visual artists, for the periods of June 8-December 31, 1978 and January 1-June 30, 1979, under the Tribunal's reporting requirement (a subject separately discussed), only 19 of the 270 member stations of PBS submitted cue sheets or listings of visual uses. In addition to the 19 stations (not identical for each period), 22 stations indicated that no use had been made of the compulsory license for visual works. During this period of slightly over one year, for PBS and non PBS programs, the total fees paid to copyright owners were $1,575.75. In addition, the sum of $1,180 has been placed in trust for unknown copyright owners. Thus, the total allocated payments were $2,755.75. It is stated by spokesmen for the visual artists that the cue sheets account "for only 1.7 percent of original broadcast hours distributed by PBS." PBS, in its reply comments to the Tribunal, did not challenge the accuracy of these figures, but reached different conclusions from the data than those advanced by the visual artists spokesmen.

The visual artists representatives, on the basis of their examination of the cue sheets, generally conclude either: (1) so little use is being made of the compulsory license that it is unnecessary and should be repealed, or (2) if the compulsory license is of significant benefit to PBS, there has then been widespread noncompliance with the payment and reporting requirements, causing significant injury to visual artists, and consequently 118 should be repealed.

They make reference, as was extensively explored during the Tribunal's public broadcasting rate proceeding, to the interest of public broadcasting in securing ancillary and other rights greater than those conferred by Section 118.

PBS responds that the visual rights of 118 have been of significant benefit to public broadcasting. They assert that visual uses are not being significantly reported on cue sheets because "many uses are either public domain uses, fair uses, exempt uses, uses pursuant to voluntary licenses, etc." It is also maintained that "a great many of the works now used were created prior to June 8, 1978; and are in the public domain. In the future, virtually all visual works used will be in copyright and thus usable only under Section 118."

---

[4] Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House of Representatives Committee on the Judiciary, 94th Congress, on H.R. 2223, p. 869 (1975).

On the basis of the experience to date, the Tribunal must conclude that the limited use made of the compulsory license for visual works cannot justify interference with the traditional operation of the copyright system, the freedom of the market place, and the artistic freedom of the creators of visual works. The Tribunal notes the significant statement of a special PBS counsel that "From what we understand from many of our stations, such as WNET, they are at this point obtaining direct licenses to utilize the works involved rather than availing themselves of Section 118. This would be particularly understandable where rights to use the original photographic print, for example, are involved or where ancillary rights which are not included in Section 118 are needed." [5]

PBS states that in future years there may be greater use of Section 118 because, in their view, a larger number of visual works will be subject to copyright protection. Everyone is entitled to speculate about the future, but the Tribunal currently had no basis for concluding that the utilization of Section 118 will increase significantly. As has been previously noted with regard to both performing and recording rights in musical works, the trend is clearly toward direct licensing.

REPORTING REQUIREMENTS

Section 118(b)(3) provides that "the Copyright Royalty Tribunal shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such uses shall be kept by public broadcasting entities." The Tribunal is convinced that public broadcasting, which sought and obtained the compulsory license, has a major responsibility to implement efficiently the payment and reporting requirements.

During the public broadcasting proceedings, the representatives of public broadcasting argued that the Tribunal should only require the payment and reporting of national program uses. It was argued that such a procedure was followed in the voluntary agreement reached between PBS/NPR and the Harry Fox Agency.

Specific payment and reporting requirements have been established in the Tribunal's regulation. In adopting these rates and terms, the Tribunal did not accept public broadcasting's positions concerning the treatment of non-national programming, and required payment and reporting for local programming uses. Public broadcasting continues to maintain that "the maintenance of such records is overly burdensome in relation to the small fees generated and that the necessity of keeping such records may indeed be an impediment to the use of the copyrighted works involved."

The Tribunal cannot accept these arguments. The statute and the legislative history is clear—Congress intended that copyright owners were to be paid and to be informed for *all* uses of their works, not paid and informed for *certain* uses. Voluntary arrangements may incorporate mutually beneficial alternatives, but the Tribunal cannot waive rights granted by statute to copyright owners. This is particularly significant with respect to visual works where both the congressional and Tribunal proceedings emphasized the importance of local programming uses of visual works.

The Tribunal has requested interested parties to comment on "the necessity for, adequacy of, and compliance with the reporting requirements of the Tribunal." Certain comments by copyright owners suggest inadequate reporting compliance by public broadcasting. These allegations are disputed by PBS/NPR.

The Tribunal will monitor compliance with the reporting requirements of the Act and its regulations. We have been requested in the comments to consider several changes in the reporting regulations. However, it has also been noted that certain of the proposed changes may exceed the jurisdiction of the Tribunal. In connection with its ongoing review, the Tribunal may subsequently consider those suggestions coming within its jurisdiction. Any such activity will be conducted as a Tribunal rulemaking proceeding.

CONCLUSION

It is for the Congress, not the Tribunal, to determine public policy. The public broadcasting compulsory license may present policy considerations in areas beyond the special competence of the Tribunal. However, the Tribunal has been given a broad mandate by the Congress. In the words of the House Report 94-1476, its task is "to consider both the general public interest in encouraging the growth and development of public broadcasting, and the 'promotion of science and the useful arts' through the encouragement of musical and artistic creation." On the basis of its review of the experience with Section 118, the Tribunal concludes that the compulsory license is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with the traditional functioning of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions.

---

[5] Letter of Carol F. Smikin to Tad Crawford, counsel for the Graphic Artists Guild, Dec. 14, 1979.

The copyright system can advance the constitutional objectives only if the exclusive rights of authors and copyright proprietors are preserved. Reasonable exceptions to these exclusive rights are justified *when necessary to promote public policy*. the Tribunal believes that those engaged in communications should be particularly sensitive toward the intervention of the Federal Government in the absence of compelling need.

The Register of Copyrights advised the Congress in 1975 that the proposed public broadcasting compulsory license was not "justified or necessary."[6] The Tribunal believes that the experience of the intervening years confirms the correctness of the Register's position. It is therefore the recommendation of the Tribunal that the Congress reconsider the public broadcasting compulsory license at an appropriate time.

APPENDIX B

ANNUAL REPORT OF THE COPYRIGHT ROYALTY TRIBUNAL FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1980

THE COPYRIGHT ROYALTY TRIBUNAL CREATION AND MEMBERSHIP

The Copyright Royalty Tribunal (Tribunal) was created by § 801(a) of Public Law 94-553, the General Revision of the Copyright Law of 1976, and is composed of five commissioners appointed by the President with the advice and consent of the Senate. The commissioners are: Thomas C. Brennan of New Jersey; Douglas E. Coulter of New Hampshire; Mary Lou Burg of Wisconsin; Clarence L. James, Jr. of Ohio; and Frances Garcia of Texas.

STATUTORY RESPONSIBILITIES

The Tribunal's statutory responsibilities are:

(a) To make determinations concerning copyright royalty rates in the areas of cable television covered by 17 U.S.C. 111.

(b) To make determinations concerning copyright royalty rates for phonorecords (17 U.S.C. 115) and for coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116).

(c) To establish and later make determinations concerning royalty rates and terms for non-commercial broadcasting (17 U.S.C. 118).

GENERAL ADMINISTRATION

The only staff of the Tribunal is a personal assistant to each commissioner. The legislative history of the Copyright Act reflects the intention that the Tribunal remain a small independent agency in which the commissioners perform all professional responsibilities themselves.

FISCAL YEAR 1980

Cable distribution proceeding

17 U.S.C. 111(d)(5)(B) requires the Tribunal after the first day of August to determine whether a controversy exists concerning the distribution of cable royalty fees deposited by cable systems with the Copyright Office. Upon determination that a controversy exists, 17 U.S.C. 804(d) requires the Chairman of the Tribunal to publish in the Federal Register a notice announcing the commencement of distribution proceedings.

In a public meeting on September 6, 1979, after giving claimants the opportunity to appear and present arguments, the Tribunal determined that a controversy did exist concerning the distribution of cable royalty fees. A distribution proceeding was instituted by a public notice issued September 12, 1979 (44 FR 53099).

---

[6] Letter of Register of Copyrights to Senator John L. McClellan, Jan. 31, 1975.

Therefore as of September 12, 1979 the Tribunal announced that a controversy concerning the distribution of cable royalty fees did exist for the period January 1 through June 30, 1978 and for the period July 1 through December 31, 1978, and that distribution proceedings had commenced.

Filing of claims

The Tribunal in an advance Notice of Proposed Rulemaking, published February 14, 1978 (43 FR 6263), invited comments concerning the filing of claims to royalty fees for secondary transmissions by cable systems, pursuant to 17 U.S.C. 111(d)(5)(A).

In the Federal Register of May 5, 1978 (43 FR 19423) the Tribunal announced that consideration was being given to a proposed rule which would prescribe requirements whereby persons claiming to be entitled to compulsory license copyright fees for secondary transmissions by cable systems shall file claims with the Tribunal. The proposed rule prescribed the content and time of filing such claims.

The comments and reply comments filed with the Tribunal reflected a difference of opinion among representatives of copyright owners who were likely to be major claimants as to whether the copyright statute requires filings in July 1978 for claims to royalty fees for secondary transmissions during the period January 1 through June 30, 1978. Certain comments filed maintained that the copyright statute requires filings every July, including July 1978. Other comments suggested the claims be filed in July of 1979 in view of the regulations adopted by the Copyright Office as to the filing of statements of account by cable operators.

The proposed rule required all copyright owners who wished to share in the distribution of royalty fees for secondary transmissions by cable systems during the first six months of 1978 to file claims with the Tribunal during the month of July 1978. The proposed rule required only a minimum filing of a claim in July 1978 with a requirement that the filing be supplemented in July 1979, after copyright owners had an opportunity to examine the statements of account filed by cable operators in the Copyright Office. The final rule was published in the Federal Register June 6, 1978 (43 FR 24528).

Fixation of copyrighted works

The Tribunal in an initial advisory letter of January 31, 1978 stated that participation in the royalty distribution proceedings did not require copyright owners to preserve and submit simultaneous fixations of live transmissions. In a subsequent advisory letter of November 27, 1978 the Tribunal responded to an inquiry on behalf of a television station questioning whether the use of an audio-video logger for recording a work simultaneously with its transmission complied with the requirements of the Copyright Act and the regulations of the Tribunal. The television station was informed that the use of such a device did meet the requirements of the Copyright Act and the regulations of the Tribunal.

In the Federal Register of July 28, 1978 (43 FR 32825) the Tribunal issued a proposed rule with respect to Proof of Fixation of Copyrighted Works. The proposed rule established the policy and procedures of the Tribunal concerning the submission to the Tribunal during proceedings for the distribution of cable royalty fees of evidence of the fixation of works in a tangible medium as required by Section 102(a) of the Copyright Act. Under this proposed rule, the filing of tangible fixations would not be required, and controversies concerning the fixation of works would be resolved on the basis of other appropriate evidence.

In the Federal Register of September 11, 1978 (43 FR 40225) the final rule with respect to proof of fixation of copyright works was published.

Amendment of claim rules

A notice of proposed rulemaking appeared in the Federal Register of April 4, 1979 (44 FR 20220). This notice was to inform the public that the Tribunal was proposing to supplement the rule issued June 6, 1978 (43 FR 24528) pursuant to 17 U.S.C. 111(d)(5)(A) which stated the filing requirements for those claiming to be entitled to compulsory license copyright fees for secondary transmissions by cable systems. In that rule for a claim to be valid it was required to contain the name of the claimant, the address, a general description of the copyrighted works transmitted, and an identification of at least one transmission. The proposed rule, in addition, would require the percentage or dollar figure of the license fees the claimant feels entitled to, and a justification for that amount. This rule would apply to both the 1979 filing and, as a supplement, to the July 1978 filing. The proposed rule also provided that the Tribunal prior to the distribution of royalty fees, shall deduct all costs which would not have been incurred by the Tribunal but for the distribution proceeding.

An amended version of the proposed rule was adopted and published in the Federal Register of May 23, 1979 (44 FR 29892).

Structure of proceeding

The Tribunal in its order of September 12, 1979 (44 FR 53099) also directed claimants, or their duly authorized representatives, to submit proposals on the structure and procedures of the distribution proceedings to the Tribunal no later than October 1, 1979. A pre-hearing conference of claimants was held on October 11, 1979 to discuss the structure and procedures of the proceeding.

After receipt of the proposals and consideration of the claimants' statements during the pre-hearing conference, the Tribunal requested further memoranda or briefs on the following issues: (a) Concerning the issue of the Broadcast day as a copyright compilation; (b) concerning the issue of programming of which a broadcast station is an exclusive licensee; (c) concerning the objections raised as to the standing of certain or all sports claimants; (d) concerning any other question of copyright ownership as it affects a claim or right to any of the cable television royalties Federal Register of October 17, 1979 (44 FR 59930). The Tribunal deemed these to be "threshold issues" which necessarily had to be resolved before the hearings commenced. These submissions were to be received by the Tribunal no later than November 15, 1979; reply comments no later than November 28, 1979. Oral arguments on the above issues commenced on December 5, 1979 and continued on December 6.

Scope of claims

In the Federal Register of October 22, 1979 (44 FR 60726) the Tribunal published a final rule with respect to filing of claims to cable royalty fees. This rule amended 37 CFR, Chapter III, Part 302, §§ 302.2 and 302.6 by providing that the Tribunal shall accept as a valid claim all claims filed prior to July 31, 1979 and further that said claims will cover the full calendar year of 1978.

Pre-hearing memoranda

In the Federal Register of December 19, 1979 (44 FR 75201) the Tribunal issued an order calling for pre-hearing memoranda on the submission of evidence and other hearing procedures regarding the conduct of this proceeding. The Tribunal indicated that these memoranda should be filed in accordance with the following:

(a) The Copyright Act does not provide for the payment of cable royalty fees to broadcaster claimants for the secondary transmission of the broadcast day as a compilation.

(b) The Copyright Act does not provide for the payment of cable royalty fees to broadcaster claimants who have acquired rights to syndicated programming in a market, which rights are exclusive against other broadcasters in that market, when the syndicated programming is included in distant broadcasts which are retransmitted into the broadcaster's market.

(c) The Copyright Act provides for the distribution of cable royalty fees to performing rights organizations.

(d) The Copyright Act provides that cable royalty fees awarded for secondary transmission of certain sporting events shall be distributed to the sports claimants except when contractual arrangements specifically provide that such royalty shall be distributed to broadcaster claimants.

This order was the subject of a Petition for Review, No. 80-1076, filed by the National Association of Broadcasters (NAB) on January 17, 1980 in the United States Court of Appeals for the District of Columbia Circuit. The Petition for Review was challenged by motions to dismiss, filed on behalf of the Tribunal, Program Syndicators, Joint Sports Claimants, and ASCAP. The Court by *per curiam* order dated April 21, 1980 dismissed the petition on the basis that the "matter is not ripe for judicial review."

This order was the subject also of an "Application for Stay and Continuance" filed by NAB with the Tribunal on January 18, 1980.

The Tribunal issued an order on January 29, 1980 in which it denied NAB's application for a stay and a continuance.

Evidentiary proceeding

The Tribunal's December 19, 1979 order (44 FR 75201) requesting memoranda on presentation of evidence and conduct of the hearing brought responses from all categories of claimants. These matters were considered at a pre-hearing conference held on February 14, 1980.

On February 14, 1980 after hearing the views of claimants, the Tribunal ruled that the current cable distribution proceeding would be conducted in two phases. Phase I would determine the allocation of cable royalties to specific groups of claimants. Phase II would allocate royalties to individual claimants within each group.

Phase I of the evidentiary hearing began on March 31, 1980 and continued over a period of 13 days, concluding May 6, 1980.

On May 7, 1980 the Tribunal issued an order governing the schedule for further proceedings which provided that:

(a) Claimants who were precluded from submitting evidence on claims excluded by the Tribunal's order of December 19, 1979 were required to submit a written direct case on such matters by May 19, 1980 and hearings on such claims were scheduled for May 22 and 23, 1980.

(b) On May 23 interested parties were to submit briefs on legal issues arising from the situation of those categories of claimants not fully represented by its total number of eligible claimants ("unclaimed funds").

(c) Rebuttal testimony consisting of a list of witnesses and a concise statement of their testimony were to be filed on May 23, 1980 and hearings on rebuttal testimony were to commence on May 27, 1980.

(d) All joint claimants were required to file on June 6, 1980 information concerning the allocation of total shares to individual claimants and/or the matters that will require consideration by the Tribunal in Phase II of the proceeding.

Pursuant to the Tribunal's order, NAB presented its direct case with respect to its claims based on compilation, exclusivity and sports programs. Hearings on these claims were held on May 22 and 23, 1980 at which time the record was closed with respect to such claims.

Briefs were filed on May 23, 1980 by several parties setting forth their respective positions concerning unclaimed funds.

On May 23, 1980 Program Syndicators, Joint Sports Claimants and NAB filed their rebuttal cases. Hearings were held on these presentations on May 27, 28 and 29, 1980 after which the record in Phase I of these proceedings was closed. The Tribunal directed the parties to file proposed findings of fact and conclusions on July 7, 1980.

In order to permit the Tribunal to proceed to Phase II of this proceeding, the Tribunal published a summary statement of its Phase I determinations in the Federal Register of July 30, 1980 (45 FR 50621).

The Tribunal also announced in this statement that Phase II of the proceeding would commence on August 18, 1980 and would continue on such subsequent days as were necessary. This date was subsequently delayed to August 19, 1980.

In preparation for Phase II the Tribunal in its order of May 7, 1980 directed joint claimants to advise the Tribunal of the status of arrangements for voluntary agreements for distribution of royalty fees among the members of a joint claim. On the basis of the replies of this order, it was the understanding of the Tribunal that there were no Phase II issues involving the distribution of royalty fees among the Joint Sports Claimants, the National Collegiate Athletic Association, the Public Broadcasting Service, National Public Radio and among the commercial television stations represented by the National Association of Broadcasters.

There were pending before the Tribunal a number of claims filed by copyright owners who were not associated with a joint claim or joint representation before the Tribunal. These claimants were ordered to submit not later than August 15, 1980, any entitlement justification which they wished to have considered by the Tribunal in the determintion of their share of the royalty fees. Phase II hearings concluded on August 21, 1980. The final determination in the 1978 Cable Royalty Distribution Determination was published on September 23, 1980 (44 FR 63026).

Coin-operated phonorecord players: Royalty adjustment proceeding

17 U.S.C. § 804(a)1 provides that the Copyright Royalty Tribunal shall publish a notice in the Federal Register on January 1, 1980 of the commencement of proceedings concerning the adjustment of royalty rates for coin-operated phonorecord players as provided in section 116. It is further provided that the Tribunal shall render its final decisions in this proceeding within one year from the date of such publication. Pursuant to statute the notice was issued (45 FR 62).

The Amusement and Music Operators (AMOA) and the three principal music performing rights societies—American Society of Authors, Composers, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc. responded to the Tribunal's notice of January 2, 1980.

On February 13 in the offices of the Tribunal a meeting was held with all interested parties for the purpose to discuss the economic survey to be conducted by the AMOA and to make recommendations on the nature of the information solicited. The Tribunal and the performing rights societies offered suggestions to be included in the survey but were informed by the AMOA that the questionnaires for the survey had already been mailed. Therefore the meeting did not serve the purpose for which it was originally intended.

The Tribunal conducted public hearings to receive testimony on the adjustments of royalty rates as provided in section 116 on April 2, 3, 4, 21, and 22. Rebuttal was heard on May 16 and 19, 1980. In addition to the material presented at these hearings, the Tribunal received additional written statements and documentary evidence submitted in accordance with the rules of the Tribunal. The parties were directed by the Tribunal to file proposed findings of fact and conclusions of law on September 16, 1980. At the end of fiscal 1980, no final determination had been rendered by the Tribunal.

Compulsory license for secondary transmission by cable systems: Royalty adjustment proceeding

The Tribunal instituted these proceedings by a public notice issued January 1, 1980 (45 FR 63). This notice was given pursuant to 17 U.S.C. § 804(a)(1) which requires that the Tribunal conduct a proceeding in 1980 in accordance with 17 U.S.C. § 801(b)(2)(A) and (D) concerning the adjustment of royalty rates and gross receipts limitations established in 17 U.S.C. 111 pertaining to secondary transmission by cable systems.

Section 801(b)(2)(A) and (D) authorizes the Tribunal to make determinations solely in accordance with the following provisions:

The rates established by section 111(d)(2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act;

The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section.

In order to establish the necessary factual information with respect to this proceeding, the Tribunal developed a cable system questionnaire which requested cable operators to list their monthly first-set subscriber rates as of October 19, 1976 and April 1, 1980. In addition, the questionnaire requested information on whether the responding cable system was subject to rate regulation and, if so, the extent to which rate increases had been denied by regulatory authorities. The Tirbunal accorded Motion Picture Association of American, National Cable Television Association and Community Antenna Television Association the opportunity to review the questionnaire and to suggest additional questions. The questionnaire was then sent to all cable systems that had filed a statement of account with the Copyright Office and the Tribunal received, 2,251 replies.

Pursuant to the Tirbunal's Notice, a statement on jurisdiction and legal questions was filed on May 1, 1980, by National Cable Television Association (NCTA). Economic and other studies were filed with the Tribunal on May 19, 1980, by NCTA and Copyright Owners, and each of these parties filed replies on June 2, 1980. No other parties responded to the Tribunal's Notice.

Hearings were conducted by the Tribunal on September 29 through October 6, 1980, at which time Copyright Owners and NCTA presented their cases through their respetive witnesses. The proceeding was in process at the end of the fiscal year.

Compulsory license for making and distributing phonorecords: Royalty adjustment proceedings

The Tribunal's Notice of January 1, 1980 (45 FR 63) announced that the current proceeding would be conducted in accordance with the Tribunal's Rules of Procedure. The Tribunal directed parties to submit motions concerning jurisdictional or legal questions by March 3, 1980, and reply comments by March 20, 1980. The Tribunal further directed that economic or other studies be prepared in accordance with the Tribunal's Rules of Procedure, and scheduled submission of such studies by April 1, 1980, Finally, the Tribunal scheduled an evidentiary hearing to commence on April 28, 1980.

In accordance with the Tribunal's Notice, NMPA and AGAC independently filed papers on March 3, 1980 describing the Tribunal's authority to express the statutory rate as a percentage of the price of phonorecords, or, alternatively, to index a flat cent royalty, determined de novo, to changes in the cost of living.

On March 25, 1980 the Tribunal convened to hear oral argument on the jurisdictional issue. NMPA, AGAC and RIAA appeared. At the conference's close, the Chairman announced postponement of submission of economic and other studies to April 7, and of commencement of the evidentiary hearing to May 6.

On March 27, 1980, the Tribunal denied RIAA's motion to declare "that any adjustment of the royalty rate established in 17 U.S.C. § 115 (mechanical royalty) to provide for the fixing of the royalty rate as a percentage of the price of the phonorecord is beyond the jurisdiction of the Tribunal." The Tribunal further ruled to take and consider evidence on proposed percentage formulas for the mechanical royalty rate.

In accordance with the Tribunal's directives, NMPA, AGAC, and RIAA submitted economic and other studies on April 7, 1980. The evidentiary hearings commenced and at the end of fiscal 1980 the hearings were still in process.

Cost-of-living adjustment for noncommercial broadcasting

In its final rule of June 8, 1979 (43 FR 25068) announcing the terms and rates of royalty payments to be paid by non-commercial broadcasting for the use of certain copyrighted works, the Tribunal included a provision that on the first of August of each year, the Tribunal shall publish in the Federal Register a notice of the annual change in the cost of living, as determined by the Consumer Price Index. Such a notice was published on August 1, 1980 and the schedule of noncommercial broadcasting royalty rates was accordingly revised (44 FR 51197-8).

Distribution of jukebox royalties

Pursuant to 17 U.S.C. § 116(c) the Tribunal was advised by the performing rights societies that a controversy did not exist as to the distribution of the 1978 royalty fund. Pursuant to said section distribution was made in pro rata shares as the performing right societies stipulated among themselves.

Study in audio home taping

The Tribunal in November, 1979 published the results of the first United States official survey of consumer practices and attitudes concerning the home taping of audio works. This survey was conducted as part of the Tribunal's examination of the copyright implications of the use of taping machines utilizing copyright materials.

The release of the survey was accompanied by a report of the Tribunal's Home Taping Committee which stated:

"In addition to further refinement and development of the subjects explored in the survey (including appropriate projections from the data), a number of other areas must be examined before any valid conclusions may be reached or policy recommendations formulated. Among these subjects would be examination of the trends in the sale of blank tape, consideration of the sales volume, prices and revenues of the prerecorded music industry, the impact of home taping on the creation and production of new product, the status of technological developments which could alter the ability to engage in home taping, and economic and population trends which could influence the extent of personal taping."

Report of the Tribunal on the use of certain copyrighted workd by noncommercial broadcasting

The Tribunal in January, 1980 transmitted to the Judiciary Committees of the United States Senate and House of Representatives its report and recommendations on the "Use of Certain Copyrighted Works in Connection With Noncommercial Broadcasting." This report was presented in accordance with 37 CFR 304.14, the Tribunal's regulation adopted at the conclusion of its 1978 public broadcasting proceeding.

The Tribunal's report reviewed the necessity for a public broadcasting copyright compulsory license for the performance of nondramatic musical works, the recording of nondramatic performances and displays of musical works, and the use of published pictorial, graphic and sculptural works. The report also considered the Tribunal's regulations concerning the record keeping and reporting by public broadcasting of the use of copyrighted materials subject to the statutory compulsory license found in 17 U.S.C. 118.

The Tribunal concluded that "on the basis of its review of the experience with Section 118, the Tribunal concludes that the compulsory license is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with the traditional functioning of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions." The Tribunal recommended that "the Congress reconsider the public broadcasting compulsory license at an appropriate time."

EXPENDITURES AND FISCAL STATEMENT OF ACCOUNT

Financial highlights of the Copyright Royalty Tribunal's third fiscal year of operations

Amount allotted	$471,000
Obligated	461,196
Unobligated allotment	9,804

The major expenditures were for administration, with the largest being for salaries and personnel benefits ($378,991), and rental space ($23,606). The three major hearings held by the Tribunal this fiscal year resulted in an increase in cost of hearings ($29,230).

Following is the detailed fiscal statement of account:

COPYRIGHT ROYALTY TRIBUNAL STATEMENT OF ACCOUNT, FOR THE YEAR ENDING SEPTEMBER 30, 1980

Name	Amounts	
	Allotted	Obligated
Salaries and compensation	$353,000	$350,993
Personnel benefits	28,300	27,997
Travel and transportation of persons	2,800	1,796
Postage	1,200	1,199
Local telephone	2,400	2,398
Long distance telephone	800	800
Rental of equipment	2,000	1,920
Rental of space	23,700	23,606
Printing, forms	4,900	1,926
Other services, miscellaneous	1,000	480
Services of other agencies	16,000	15,595
Repair of equipment	500	432
Grievance and arbitration services	32,000	29,231
Office supplies	1,400	1,825
Books and library materials	1,000	998
Total	471,000	461,196

THE IMPLEMENTATION OF THE GOVERNMENT AND THE SUNSHINE ACT

The Government in the Sunshine Act requires each agency subject to the Act to report annually to the Congress regarding its compliance with the provisions of the Act. In assembling and organizing the required information, the Tribunal has followed the format and procedure requested by Senator Lawton Chiles, Chairman of the Senate Subcommittee on Federal Spending Practices and Open Government.

3-5. During fiscal year 1980, the Tribunal held 79 meetings. During fiscal year 1980, no meetings in whole or in part were closed to the public. On one or more occasions, drafts of correspondence prepared by the Chairman or other Commissioners have been circulated to Commissioners for review. However, such correspondence does not constitute official action of the agency. Given the smallness of the agency, we have held no wholly or partially closed meetings.

6. Since its establishment, the Tribunal has never utilized notational voting in the consideration or adoption of agency rules, other final actions, or in reaching the final determinations described in the Coyyright Act (P.L. 94-553). As stated above, on one or more occasions, drafts of correspondence prepared by the Chairman or other Commissioners have been circulated to Commissioners for review. However, such correspondence does not constitute official action of the agency.

7. The Tribunal has no permanent professional staff and consequently there are no staff papers to be made available to the public. Section 301.12(c) of the Tribunal's Rules of Procedures provides, "Reasonable access for news media will be provided at all public sessions provided that it does not interfere with the comfort of Commissioners, staff, or witnesses. Cameras will be admitted only on the authorization of the Chairman, and no witness may be photographed or have his testimony recorded for broadcast if he objects." Since its establishment, the Tribunal has not in practice precluded the use of cameras or recording devices.

8. Three methods of notifying the public of agency meetings have been utilized:

A. Publication of hearing notice in the Federal Register.

B. Informal personal notification of persons known to have an interest in a particular subject matter.

C. Use of the trade press to bring the proceedings of the Tribunal to the attention of persons not likely to read the Federal Register.

The policy of the Tribunal has been to provide at least thirty days notice of the commencement of any proceedings, other than proceedings limited to the internal operations of the agency.

9. As stated earlier, the agency is small and all meetings have been open. This question, is therefore, not applicable.

10-11. The Tribunal's procedure for releasing transcripts, recordings, or minutes of closed meetings, is established in Section 301.15 of the Rules of Procedure which provides "(a) All meetings closed to the public shall be subject to either a complete transcript or, in the case of § 301.13 (i) and at the Tribunal's discretion, detailed minutes. Detailed minutes shall describe all matters discussed, identify all documents considered, summarize action taken as well as the reasons for it, and record all rollcall votes as well as any views expressed" and "(b) Such transcripts or minutes shall be kept by the Tribunal for 2 years or 1 year after the conclusion of ther proceedings, whichever is later. Any portion of transcripts of meetings which the Chairman does not feel is exempt from disclosure under § 301.13 will ordinarily be available to the public within 20 working days of the meeting. Transcripts or minutes of closed meetings will be reviewed by the Chairman at the end of each calendar year and if he feels they may at that time be disclosed, he will resubmit the question to the Tribunal to gain authorization for their disclosure." Since the Tribunal has never closed a meeting to the public, the Tribunal has not had any occasion to implement this language or further adopt procedures pertaining to the closing of meetings.

12. As we have held no closed meetings, there have been no complaints, formal or informal, of our Sunshine procedures.

13. Section 301.17 of the Tribunal's Rules of Procedure on ex parte communication reads as follows: "(a) No person not employed by the Tribunal and no employee of the Tribunal who performs any investigative function in connection with a Tribunal proceeding shall communicate, directly or indirectly, with any member of the Tribunal or with any employee involved in the decisions of the proceeding, with respect to the merits of any proceeding before the Tribunal or of a factually related proceeding" and "(b) No member of the Tribunal and no employee involved in the decision of a proceeding shall communicate, directly or indirectly, with any person not employed by the Tribunal or with any employee of the Tribunal who performs an investigative function in connection with the proceeding, with respect to the merit of any proceeding before the Tribunal or of a factually related proceeding."

SUNSHINE ACT MEETINGS

Meetings and date(s)

Jukebox, CRT budget, rules, etc., November 9, 1978.
Cable Royalty Fees, May 18, 1979.
Claims to Cable Royalty Fees, September 6, 1979.
Cable Royalty Proceedings, October 11, 1979.
Cable & Jukebox Distribution, December 5 and 6, 1979.

Cable royalty distribution proceeding

February 15.
March 31.
April 8, 9, 10, 24, 25, 28, 29, 30.
May 1, 2, 5, 6, 22, 23, 27, 28, 29.
August 19, 20, 21.

Coin-operated phonorecord players: royalty adjustment proceeding (jukebox)

March 28.
April 2, 3, 4, 21, 22.
May 16, 19.

Compulsory license for making and distributing phonorecords: royalty adjustment proceeding (mechanical)

March 10, 25.
April 23.
May 7, 8, 13, 14, 15, 20, 21.
June 3, 4, 5, 10, 11, 12, 17, 18, 19, 24, 25, 26.

July 1, 2, 3, 8, 9, 10, 15, 16, 17, 18, 22, 23, 24, 29, 30, 31.
August 1, 5, 6.

Compulsory license for secondary transmissions by cable systems: royalty adjustment proceeding

September 29, 30.

Appendix C

Copyright Owners Proposal for a System-by-System Rate for Cable

77. A semiannual cost of living revision, in connection with the system-by-system adjustment procedure discussed below, would place only a minimal administrative burden upon the Tribunal. Section 304.10 of the Tribunal's rules requires it to publish each year in the Federal Register a notice of the change in the cost of living as measured by the CPI for use by non-commercial broadcasters in computing their royalty payments. The information needed to compute this change is easily obtained from the Bureau of Labor Statistics of the Department of Labor. The same procedure could be used by the Tribunal to advise cable systems of changes in the CPI to be applied to their royalty payments. This notice could also be provided to cable systems by the Copyright Office along with its routine distribution of statement of account forms.

78. In order to insure that the royalty rate adjustment is fair to individual cable systems as well as to copyright owners, a system-by-system rate adjustment should be required rather than an across-the-board industry adjustment. An industry-wide adjustment would unfairly penalize those cable systems that have maintained their subscriber rates at a real constant dollar level. On the other hand, systems that have not increased their subscriber rates along with inflation, for whatever reason, would pay less than their fair share. The record indicates that larger, newer cable systems might be able to significantly reduce the level of their royalty payments under the current payment procedure by offering multiple tiered packages at low rates. This reduction would have to be made up for, at least in part, by smaller, older systems that employ more traditional marketing techniques. Such inequities would be eliminated under a system-by-system adjustment.

79. A system-by-system approach would also minimize the administrative burdens placed upon the Tribunal. An industry-wide adjustment would require the Tribunal to publish, in addition to the CPI increase, a factor establishing the average subscriber rate increase since the preceding adjustment. This determination would require periodic surveys such as the one conducted this year by the Tribunal. Also, a substantial lag time between when cable systems reported this data and when it could be used in a royalty rate adjustment would be inherent in any industry-wide procedure. These problems would not be encountered under a system-by-system approach, because each individual system would use its own particular subscriber rate increases or decreases in computing its royalty rate adjustment. Newer systems that did not have a 1976 subscriber rate would use the average 1976 subscriber rate for DSE systems of $6.60 as their base rate. Each cable system would simply determine the change in its average subscriber rate since October, 1976, and compare that change with the inflation change reported by the Tribunal. Thus, both fairness and efficiency favor an adjustment of each cable system's royalty rate, based upon the particular subscriber rate history of that system, to maintain the real constant dollar value of each system's royalty payment.

80. A system-by-system royalty rate adjustment is fully consistent with the statute and within the Tribunal's rate adjustment authority. Such an adjustment would reflect (i) national monetary inflation or deflation and (ii) changes in the average rates charged cable subscribers. Moreover, it would maintain precisely the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of the Act. Whereas the wording of the statute might also support an industry-wide royalty rate adjustment, it certainly does not preclude a system-by-system adjustment if such an adjustment would be more fair, more efficient and would more appropriately accomplish the statutory purpose.

B. Gross receipts adjustment

81. The Tribunal is required to adjust the gross receipts limitations established by section 111(d)(2)(C) and (D) to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value to the exemption provided by the Act. (17 U.S.C. § 801(b)(2)(D).) The purpose of this adjustment is to insure that systems of the size entitled to the exemptions in 1976 continue to be so entitled.

82. Neither party in this proceeding argues that the adjustment to be made here should reflect both the inflation factor and the subscriber rate factor. Copyright Owners propose that the adjustment reflect only subscriber rate changes. NCTA contends that only the inflation factor should be considered. Both parties agree that the purpose of this adjustment is to maintain the value of the small system exemptions.

83. The record clearly supports the view of Copyright Owners that the small system adjustment should reflect only changes in subscriber rates. As illustrated in Copyright Owners Exhibit R-6, application of the inflation factor would increase the value of the gross receipts limitations for those systems that have not increased their subscriber rates up to the rate of inflation. Thus, systems of the same size that were not entitled to the exemptions in 1976 might be so entitled in 1981 if the limitations were increased by the inflation factor. If the subscriber rate factor is applied, such windfalls will not occur. Small cable system which have increased their subscriber rates will benefit to the extent that the exemption brackets will increase to the same degree in order to maintain the value of the exemption. Systems which have previously qualified for the exemptions will change their status only by virtue of increasing their number of subscribers, regardless of the rate of inflation. Thus, consistent with the purposes of the statute, the gross receipts limitations should be adjusted according to changes in subscriber rates as recommended by Copyright Owners.

84. Fairness and administrative ease also require semiannual adjustment to the gross receipts limitations on a system-by-system basis. Small cable systems ought not be denied their exemption because they have increased their subscriber rates due to inflation during the period until the next adjustment proceeding. Thus, an adjustment should be made for each semiannual accounting period to assure that systems of the same size continue to be entitled to the exemptions. Such semiannual adjustments can be made simply and efficiently by using a system-by-system approach whereby each cable system can compute new gross receipts limitations based upon the change in that system's subscriber rates since October, 1976. For new systems, the base rate of $6.60 used to compute the royalty rate adjustment should be used to calculate new gross receipts limitations. This procedure is fully consistent with the statute and makes use of the same calculations to be made in adjusting each system's royalty rate.

APPENDIX D

THE UNITED STATES TRADEMARK ASSOCIATION,
New York, N.Y., February 27, 1981.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, House Judiciary Committee,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The United States Trademark Association is pleased to learn of your decision to hold oversight hearings on the operations of the Patent and Trademark Office on March 4.

In large measure, the Association's past support for an independent PTO has been the disarray of affairs within the entire PTO and particularly the lack of Commerce Department support for an effective trademark system. The effects of your committee's interest and focus on improving this situation has and we are certain will continue to have a dramatic effect upon the overall economy from both a consumer and producer perspective.

As we understand it, this hearing on the PTO will consist solely of testimony from Acting Commissioner Rene Tegtmeyer and although we hope you would schedule subsequent hearings at which time those from the private sector would be invited to participate, we would like to raise a few areas of concern relative to trademark operations we would hope your committee would address on March 4.

1. The essential problem confronting trademark owners is the time required to obtain a federal registration. Reasonably, the period of time from filing an application to the issuance of a registration should be from nine months to one year. Yet, it has been estimated that in fiscal year 1981, it will take up to twice that long to receive a "first action." Such delays have a particularly adverse effect upon the ability of small businesses to market new products effectively. What is being done to speed the registration process?

2. While attributing this problem to a lack of funds may sound simplistic, it is in large measure the root cause. From 1975 to 1980, the number of applications received in the office has increased 50 percent. Yet, during those same years, the funds allocated for the registration of trademarks increased only 11 percent. When

is it anticipated that formulation of the PTO's budget will reflect this dramatic increase in activity?

3. One easily recognizable area where a lack of funds has been particularly damaging is the printing of the *Official Gazette*. By law, the OG is to be printed weekly, yet a lack of funds for this purpose has created sizable backlogs. To illustrate this point, during fiscal year 1980, over 16,000 new marks could not be issued for this very reason. Thus, while 52,000 new applications were received in the Office, only 14,000 were actually issued. What steps have and are being taken to assure that the *OG* will be published on time and that backlogs now being cleared will not recur?

4. USTA is also concerned that the real needs of the PTO have never been made clear because those most familiar with the issues and problems have not had the opportunity to candidly and directly deal with the Hill. Consequently, we wonder whether the reestablishment of direct ties between the appropriate Congressional committees and the Commissioner and Assistant Commissioners would result in greater office efficiency.

5. Computerization of the public search room is essential. There are over one half million marks on file and searches are becoming increasingly difficult. When is it anticipated that this long overdue project will be completed?

6. There is a 75 percent turnover in the legal staff of the trademark office and the time needed to train new personnel contributes dramatically to low levels of productivity. What can be done to change this pattern?

7. It can take months for new employees to receive telephones and most employees are forced to work with antiquated equipment and furniture. How can this problem best be addressed? What is the status of the trademark office's effort to acquire its first word-processing equipment?

8. The third floor of Building III in Crystal City, which previously housed the Trademark Trial and Appeal Board (TTAB) has been laying idle for nine months while many staff members have hardly enough space to sit down. When will the required renovation of this space, which we understand will house trademark employees, be completed?

9. The "warehouse" where trademark files are stored demands attention. It can take as much as six months to receive copies of files and on many occasions they cannot be found at all due to loss and misplacement. What is being done to improve this situation?

10. A clerical staff of adequate size and with adequate skills is a must in the trademark office considering the quantity and technical nature of the work. Although we are exceptionally pleased that the office has received the additional examiners it needed, the shortage of clerks prohibits the communication of the results of their work to the private sector. When the hiring freeze is lifted, are there plans to increase the number of clerks to handle trademark matters? Has any consideration been given to upgrading these positions so that those who are hired will possess the minimal skills necessary to an efficiently run operation?

Again, Mr. Chairman, The United States Trademark Association commends you for your efforts to improve the effectiveness of the PTO and we extend our willingness to be of assistance in your efforts.

Sincerely yours,

ROBERT D. O'BRIEN, *President*.

○